

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF TEXAS, et
al.,

Plaintiffs,

vs.

Case No. 12-CV-03394 (DLC)

PENGUIN GROUP (USA), INC.,
et al.,

Defendants.

This Document Relates to: Case No. 11-MD-02293 (DLC)

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VIDEOTAPED DEPOSITION OF

ROGER G. NOLL, Ph.D.

November 1, 2013

Palo Alto, California

8:34 a.m.

By Reported:

WENDY E. ARLEN, CSR #4355, RMR, CRR

Job No: 32239

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| <p style="text-align: right;">18</p> <p>08:49:23 1 Q. And then if you could flip to page 5 of</p> <p>08:49:26 2 Exhibit 1, the second paragraph under the heading</p> <p>08:49:29 3 Summary and Conclusions.</p> <p>08:49:31 4 A. Yes.</p> <p>08:49:32 5 Q. In that paragraph you talk about the -- the</p> <p>08:49:36 6 tasks that you identified after reading the judge's</p> <p>08:49:40 7 opinion. Do you see that?</p> <p>08:49:41 8 A. Yes.</p> <p>08:49:41 9 Q. And does that set forth tasks you pursued</p> <p>08:49:47 10 in -- in preparing your report?</p> <p>08:49:48 11 A. Yes.</p> <p>08:49:49 12 Q. Okay. Were there any other tasks that you</p> <p>08:49:51 13 undertook that you can remember?</p> <p>08:49:53 14 A. I believe that all -- all the contents of my</p> <p>08:49:56 15 reports are summarized there, yes.</p> <p>08:49:58 16 Q. Okay. Professor, are you familiar with the</p> <p>08:50:01 17 term but-for world?</p> <p>08:50:03 18 A. Yes.</p> <p>08:50:03 19 Q. And you've used that term before?</p> <p>08:50:06 20 A. Yes, to the minimum possible extent.</p> <p>08:50:09 21 Q. I note a certain reticence to use it in this</p> <p>08:50:15 22 document. Is there a reason for that?</p> <p>08:50:16 23 A. I just don't like the term.</p> <p>08:50:18 24 Q. It's an ugly term.</p> <p>08:50:21 25 A. It's an ugly term. I think it's less clear</p>                                                                                                          | <p style="text-align: right;">20</p> <p>08:51:29 1 A. Correct.</p> <p>08:51:30 2 Q. And you read that carefully, I assume?</p> <p>08:51:33 3 A. Yes, several times.</p> <p>08:51:34 4 Q. Several times. Is that the basis for your</p> <p>08:51:39 5 understanding that the existence of anticompetitive</p> <p>08:51:42 6 conduct through price fixing has been established in</p> <p>08:51:44 7 this case?</p> <p>08:51:45 8 A. Yes, as I explained elsewhere, I'm relying on</p> <p>08:51:48 9 that completely for the foundation for the analysis</p> <p>08:51:52 10 that I'm doing.</p> <p>08:51:53 11 Q. As you understand it, are all of the material</p> <p>08:51:57 12 elements of the but-for world in this case</p> <p>08:52:00 13 established in the Court's opinion?</p> <p>08:52:02 14 MR. FRIEDMAN: Objection, form.</p> <p>08:52:03 15 THE WITNESS: I believe so, but, I mean, I'm</p> <p>08:52:09 16 open to reason. But I believe, yes, they're...</p> <p>08:52:14 17 Q. MR. SWANSON: What, in your view, are those</p> <p>08:52:16 18 material elements of the but-for world?</p> <p>08:52:18 19 MR. FRIEDMAN: Objection, form.</p> <p>08:52:20 20 THE WITNESS: I don't fully understand what</p> <p>08:52:21 21 you mean. What do you mean by material elements?</p> <p>08:52:24 22 What are you after?</p> <p>08:52:25 23 Q. MR. SWANSON: Well, I guess my question</p> <p>08:52:28 24 was -- first question was was it your understanding</p> <p>08:52:31 25 that the judge's opinion establishes the material</p>                                         |
| <p style="text-align: right;">19</p> <p>08:50:24 1 than using the term competitive benchmark.</p> <p>08:50:27 2 Q. I note in your report you speak of defining</p> <p>08:50:30 3 anticompetitive harm as the departure of market</p> <p>08:50:33 4 outcomes from the outcomes that would have occurred</p> <p>08:50:36 5 in the absence of anticompetitive conduct?</p> <p>08:50:38 6 A. That's right.</p> <p>08:50:38 7 Q. Is that roughly what would be equated</p> <p>08:50:42 8 normally with the but-for world concept?</p> <p>08:50:45 9 A. Yes.</p> <p>08:50:46 10 Q. And if we speak of the but-for world today or</p> <p>08:50:49 11 at least if I ask you questions about the but-for</p> <p>08:50:51 12 world, you'll understand that that's what I'm</p> <p>08:50:53 13 referring to?</p> <p>08:50:54 14 A. I understand what you mean.</p> <p>08:50:57 15 Q. Let me ask you to turn to page 8 of your</p> <p>08:51:00 16 report, and at the bottom of that page, actually the</p> <p>08:51:10 17 last sentence which is a carry-over to the next page,</p> <p>08:51:14 18 you say the starting place for your analysis is that</p> <p>08:51:17 19 the existence of anticompetitive conduct through</p> <p>08:51:21 20 price fixing has been established.</p> <p>08:51:23 21 A. Yes.</p> <p>08:51:23 22 Q. Do you see that?</p> <p>08:51:24 23 A. Yes.</p> <p>08:51:25 24 Q. And now, you indicated you reviewed the</p> <p>08:51:27 25 judge's decision in the case from July, correct?</p> | <p style="text-align: right;">21</p> <p>08:52:34 1 elements. You said yes. So my question is what --</p> <p>08:52:41 2 what are the material elements that you think are</p> <p>08:52:45 3 established.</p> <p>08:52:46 4 MR. FRIEDMAN: Objection, form.</p> <p>08:52:47 5 THE WITNESS: I believe that what the opinion</p> <p>08:52:49 6 establishes is, A, a price fixing conspiracy existed</p> <p>08:52:55 7 and was implemented; B, it had an anticompetitive</p> <p>08:53:00 8 impact on prices; and, C, there were no</p> <p>08:53:05 9 pro-competitive benefits that were accomplished by</p> <p>08:53:08 10 the price fixing conspiracy.</p> <p>08:53:11 11 Q. MR. SWANSON: And are those premises or</p> <p>08:53:18 12 conclusions sufficient to dictate what the but-for</p> <p>08:53:21 13 world would look like in this case?</p> <p>08:53:23 14 MR. FRIEDMAN: Objection, form.</p> <p>08:53:26 15 THE WITNESS: I believe -- there were --</p> <p>08:53:31 16 there was -- testimony was offered on alternative</p> <p>08:53:36 17 visions of what the competitive marketplace would</p> <p>08:53:40 18 look like, and in my view, the -- the judge accepted</p> <p>08:53:47 19 the vision of the competitive world that was</p> <p>08:53:55 20 advocated by the Department of Justice and the</p> <p>08:53:57 21 states.</p> <p>08:53:57 22 Q. MR. SWANSON: Now, in addition to reviewing</p> <p>08:53:59 23 the judge's decision, you also reviewed the class and</p> <p>08:54:03 24 plaintiff stage complaints; is that correct?</p> <p>08:54:05 25 A. Yes.</p> |

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| <p style="text-align: right;">42</p> <p>09:21:33 1 have to be someone who wants to use it as an e-reader</p> <p>09:21:38 2 to buy one. In fact, you know, my grandchildren have</p> <p>09:21:44 3 iPads and they don't use them as e-readers.</p> <p>09:21:46 4 So I don't -- there is reasons to believe</p> <p>09:21:50 5 that if the complementarity exists it's de minimis</p> <p>09:21:58 6 between an iPad and e-books.</p> <p>09:22:00 7 <b>Q. Does the price of an e-reader device affect</b></p> <p>09:22:10 8 <b>the demand for e-books?</b></p> <p>09:22:12 9 MR. FRIEDMAN: Objection, form.</p> <p>09:22:13 10 THE WITNESS: I'm sorry. Ask it again. I</p> <p>09:22:15 11 got waylaid here.</p> <p>09:22:17 12 <b>Q. MR. SWANSON: No problem. I'm glad to repeat</b></p> <p>09:22:21 13 <b>a question.</b></p> <p>09:22:22 14 A. It just went out of my mind.</p> <p>09:22:24 15 <b>Q. Not a problem. Does the price of an</b></p> <p>09:22:30 16 <b>e-reading device affect the demand for e-books?</b></p> <p>09:22:35 17 MR. FRIEDMAN: Objection, form.</p> <p>09:22:37 18 THE WITNESS: If it is used significantly in</p> <p>09:22:40 19 reading e-books, then an increase in the price of</p> <p>09:22:45 20 that device might affect the demand for e-books, but</p> <p>09:22:49 21 it would depend on what was happening to the prices</p> <p>09:22:53 22 of substitutes for that device.</p> <p>09:22:55 23 If somebody wanted to read e-books on a</p> <p>09:22:58 24 tablet computer, then a change in the relative price</p> <p>09:23:02 25 of one e-reader versus another would just cause them</p>                                                      | <p style="text-align: right;">44</p> <p>09:24:26 1 of the firms.</p> <p>09:24:27 2 <b>Q. Let's take Amazon as a specific concrete</b></p> <p>09:24:31 3 <b>example. How would you, during the class period,</b></p> <p>09:24:35 4 <b>expect Amazon to take account of the price of e-books</b></p> <p>09:24:40 5 <b>when it is setting the price of a Kindle device?</b></p> <p>09:24:43 6 MR. FRIEDMAN: Objection, form.</p> <p>09:24:44 7 THE WITNESS: First of all, I have done no</p> <p>09:24:47 8 independent analysis of that. All right? So I can't</p> <p>09:24:54 9 give you an answer based on work I've done in this</p> <p>09:24:57 10 case. I just don't have an opinion about how they</p> <p>09:25:04 11 actually take into account, if at all, Kindle's</p> <p>09:25:10 12 prices when setting e-books prices.</p> <p>09:25:13 13 <b>Q. MR. SWANSON: You agree, though, don't you,</b></p> <p>09:25:17 14 <b>that the price of e-books and the price of e-reading</b></p> <p>09:25:20 15 <b>devices are related as an economic matter?</b></p> <p>09:25:22 16 MR. FRIEDMAN: Objection, form.</p> <p>09:25:22 17 THE WITNESS: I agree they could be related,</p> <p>09:25:25 18 yes. That's the point of the discussion in -- in</p> <p>09:25:28 19 this report. In principle, yes, they are related.</p> <p>09:25:35 20 But to say that they're related in a market sense is</p> <p>09:25:38 21 not the same thing as to say that any given firm has</p> <p>09:25:46 22 any firm specific discretion in how those prices are</p> <p>09:25:49 23 set.</p> <p>09:25:49 24 <b>Q. MR. SWANSON: Have you analyzed how long</b></p> <p>09:25:54 25 <b>consumers on average use the same e-reading device?</b></p> |
| <p style="text-align: right;">43</p> <p>09:23:06 1 to switch which one they bought. So it might not</p> <p>09:23:11 2 have a measurable effect, but it could in principle</p> <p>09:23:13 3 have such an effect. If in general prices of</p> <p>09:23:17 4 e-readers went up, then they would have a depressing</p> <p>09:23:21 5 effect on the demand for e-books.</p> <p>09:23:23 6 <b>Q. MR. SWANSON: And if in general the price of</b></p> <p>09:23:26 7 <b>e-readers declined, would that have a stimulating</b></p> <p>09:23:29 8 <b>effect on the demand for e-books?</b></p> <p>09:23:33 9 MR. FRIEDMAN: Objection, form.</p> <p>09:23:34 10 THE WITNESS: Again with all the caveats I</p> <p>09:23:36 11 just said, yes.</p> <p>09:23:37 12 <b>Q. MR. SWANSON: In setting e-reading device</b></p> <p>09:23:39 13 <b>prices, how would you expect retailers to take e-book</b></p> <p>09:23:43 14 <b>prices into account?</b></p> <p>09:23:44 15 MR. FRIEDMAN: Objection, form.</p> <p>09:23:45 16 THE WITNESS: What kind of retailer?</p> <p>09:23:46 17 <b>Q. MR. SWANSON: A retailer that is selling an</b></p> <p>09:23:49 18 <b>e-reading device.</b></p> <p>09:23:51 19 A. They would -- retailers that are -- that are</p> <p>09:24:00 20 integrated to the degree they have any market power</p> <p>09:24:06 21 would obviously take -- price them jointly, but if</p> <p>09:24:12 22 the market is competitive, then they wouldn't have</p> <p>09:24:16 23 any ability jointly to have any discretion. They</p> <p>09:24:20 24 would be setting -- the price would be the market</p> <p>09:24:23 25 price determined through the competitive interactions</p> | <p style="text-align: right;">45</p> <p>09:26:01 1 <b>In other words, until they replace it or stop using</b></p> <p>09:26:03 2 <b>it?</b></p> <p>09:26:04 3 A. Not in the context of this case. I don't</p> <p>09:26:08 4 recall having -- but I have seen such information,</p> <p>09:26:10 5 but none of that information plays any role in my</p> <p>09:26:13 6 damages model.</p> <p>09:26:14 7 <b>Q. So if consumers on average use e-reading</b></p> <p>09:26:19 8 <b>devices for two years, three years, that assumption</b></p> <p>09:26:25 9 <b>would not play any role in your analysis in this</b></p> <p>09:26:29 10 <b>case?</b></p> <p>09:26:29 11 MR. FRIEDMAN: Objection, form.</p> <p>09:26:30 12 THE WITNESS: No, it has no role in what I</p> <p>09:26:32 13 did for this case.</p> <p>09:26:34 14 <b>Q. MR. SWANSON: Do you, based on the general</b></p> <p>09:26:39 15 <b>information that you have, have an understanding as</b></p> <p>09:26:41 16 <b>to what the range is for average use of an e-reading</b></p> <p>09:26:45 17 <b>device?</b></p> <p>09:26:45 18 MR. FRIEDMAN: Objection, form.</p> <p>09:26:46 19 THE WITNESS: Yes, which is it's actually my</p> <p>09:26:50 20 understanding is that in the -- in terms of the</p> <p>09:26:54 21 devices that are used for e-readers, the more</p> <p>09:26:57 22 specialized device, the shorter the half-life.</p> <p>09:27:01 23 And so, you know, at one extreme personal</p> <p>09:27:04 24 computers have a long half-life, like three years.</p> <p>09:27:09 25 For specialized devices like the original Kindle and</p>                                                                                                              |

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| <p style="text-align: right;">50</p> <p>09:32:34 1 <b>price of e-books would be?</b></p> <p>09:32:35 2 A. Every single publisher sets a price for their</p> <p>09:32:41 3 book, but that price is based upon competitive</p> <p>09:32:43 4 interactions in the marketplace. So they set it</p> <p>09:32:47 5 independently, but competitive market theory says</p> <p>09:32:50 6 that their amount of discretion is de minimis.</p> <p>09:32:54 7 So the fallacy of composition would be on the</p> <p>09:32:59 8 one hand, yes, they think of themselves as setting</p> <p>09:33:02 9 their price independently, but on the other hand,</p> <p>09:33:05 10 it's the interaction among all of them that causes</p> <p>09:33:07 11 the market price to be what it is.</p> <p>09:33:09 12 <b>Q. I'm focusing on retail price of trade</b></p> <p>09:33:13 13 <b>e-books. Before agency, was there a single publisher</b></p> <p>09:33:17 14 <b>setting the retail price of an e-book?</b></p> <p>09:33:19 15 A. I don't know whether any -- there was a</p> <p>09:33:21 16 single publisher. That wasn't the common practice,</p> <p>09:33:24 17 but I do not know if there was anybody who was using</p> <p>09:33:27 18 a different model. It's not -- again, it's not</p> <p>09:33:30 19 relevant to what I did.</p> <p>09:33:31 20 <b>Q. After agency -- the definition of agency, is</b></p> <p>09:33:40 21 <b>it not, is that the publisher is setting the retail</b></p> <p>09:33:43 22 <b>price, correct, in this context?</b></p> <p>09:33:45 23 A. That's part of it, yes.</p> <p>09:33:47 24 <b>Q. And after --</b></p> <p>09:33:52 25 A. There are things that are not agency models</p>              | <p style="text-align: right;">52</p> <p>09:35:02 1 offer for sale than just the price. The agency model</p> <p>09:35:06 2 consists of a -- a retail price maintenance rule or</p> <p>09:35:12 3 retail price fixing rule on behalf of wholesalers,</p> <p>09:35:15 4 but the wholesalers are -- the sellers of the e-books</p> <p>09:35:18 5 are competing with each other. It's not, in my mind,</p> <p>09:35:22 6 accurate to say that Macmillan is competing with</p> <p>09:35:27 7 Apple and Amazon. Macmillan is competing with</p> <p>09:35:31 8 Hachette and Apple is competing with Amazon.</p> <p>09:35:35 9 <b>Q. Well, is Disney -- who is Disney and</b></p> <p>09:35:38 10 <b>Harlequin, who are they competing with?</b></p> <p>09:35:43 11 A. Anybody who -- anybody can be in both</p> <p>09:35:45 12 markets, but that is to say you can be someone who is</p> <p>09:35:49 13 both a retailer and a publisher. So you can -- your</p> <p>09:35:54 14 retail activity can be competing with other</p> <p>09:35:58 15 retailers, but your publishing activity is competing</p> <p>09:36:06 16 with other publishers.</p> <p>09:36:07 17 <b>Q. As an economist, your view is that a</b></p> <p>09:36:09 18 <b>publisher who has the power to set its retail price</b></p> <p>09:36:13 19 <b>is not competing with all the other entities who are</b></p> <p>09:36:15 20 <b>setting retail prices in the same relevant market?</b></p> <p>09:36:17 21 MR. FRIEDMAN: Objection, form.</p> <p>09:36:18 22 THE WITNESS: A publisher is competing with</p> <p>09:36:21 23 other publishers. And it may make a mistake in terms</p> <p>09:36:25 24 of its retail pricing rule, but its retail outlets,</p> <p>09:36:30 25 that a separate market. Retail and wholesale are not</p> |
| <p style="text-align: right;">51</p> <p>09:33:54 1 for which that statement would be true. So that's</p> <p>09:33:55 2 why your statement is incorrect. But, yes, part of</p> <p>09:33:58 3 what the agency model is about is the publisher</p> <p>09:34:03 4 setting a retail price. It's a retail price</p> <p>09:34:06 5 maintenance agreement.</p> <p>09:34:07 6 <b>Q. Well, agency is a model that vests the</b></p> <p>09:34:11 7 <b>decisionmaking authority in the publisher as opposed</b></p> <p>09:34:14 8 <b>to the retailer, correct?</b></p> <p>09:34:16 9 A. Well, yes, that's one characteristic of it,</p> <p>09:34:19 10 and then there are other things that aren't agency</p> <p>09:34:21 11 models where that also is true. So...</p> <p>09:34:26 12 <b>Q. Isn't it true that every publisher who</b></p> <p>09:34:28 13 <b>adopted agency became a retail competitor of Amazon</b></p> <p>09:34:33 14 <b>to that extent?</b></p> <p>09:34:34 15 MR. FRIEDMAN: Objection, form.</p> <p>09:34:36 16 THE WITNESS: I don't think that's the</p> <p>09:34:37 17 appropriate way to characterize it, no.</p> <p>09:34:39 18 <b>Q. MR. SWANSON: So a publisher, an independent</b></p> <p>09:34:44 19 <b>publisher who entered into an agency agreement with</b></p> <p>09:34:46 20 <b>Apple and gained the power to set its own prices for</b></p> <p>09:34:50 21 <b>its e-books wasn't competing with all the books the</b></p> <p>09:34:54 22 <b>Amazon was setting prices for on wholesale?</b></p> <p>09:34:56 23 MR. FRIEDMAN: Objection, form.</p> <p>09:34:57 24 THE WITNESS: The competition occurs among</p> <p>09:34:59 25 the retailers, and there's other aspects of what they</p> | <p style="text-align: right;">53</p> <p>09:36:31 1 the same relevant market, and it's not correct to say</p> <p>09:36:34 2 that the publisher who is engaged in retail price</p> <p>09:36:38 3 maintenance is in the retail market. It's not.</p> <p>09:36:40 4 <b>Q. MR. SWANSON: Is it your understanding that</b></p> <p>09:36:42 5 <b>Apple entered the trade e-books market through the</b></p> <p>09:36:46 6 <b>agency model?</b></p> <p>09:36:48 7 MR. FRIEDMAN: Objection, form.</p> <p>09:36:49 8 THE WITNESS: I don't know what you mean by</p> <p>09:36:51 9 that, and I don't know why it's relevant to a damages</p> <p>09:36:55 10 model. I have certainly made no assumptions about</p> <p>09:37:01 11 anything related to why Apple entered the e-books</p> <p>09:37:05 12 market other than what's in the opinion.</p> <p>09:37:09 13 <b>Q. MR. SWANSON: In your view, for purposes of</b></p> <p>09:37:12 14 <b>your modeling, have you made an assumption about</b></p> <p>09:37:14 15 <b>whether Apple would have distributed e-books in the</b></p> <p>09:37:17 16 <b>but-for world?</b></p> <p>09:37:19 17 A. Not beyond what's stated in the opinion, no.</p> <p>09:37:23 18 <b>Q. And did the Court make a finding on that</b></p> <p>09:37:26 19 <b>point in the opinion?</b></p> <p>09:37:26 20 A. What the Court said is it's irrelevant, that</p> <p>09:37:31 21 it's not -- that is not -- there is no</p> <p>09:37:35 22 pro-competitive benefit of that form arising from the</p> <p>09:37:39 23 implementation of the agency model. So at that point</p> <p>09:37:41 24 I dismiss it as something I need to take into</p> <p>09:37:44 25 account.</p>                                                                                                      |

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| <p style="text-align: right;">58</p> <p>09:42:27 1 discussed it in the Court's decision, are you taking</p> <p>09:42:31 2 that as a predicate fact for your modeling?</p> <p>09:42:36 3 A. No, it's -- the -- what I'm taking as a</p> <p>09:42:40 4 predicate fact is are there pro-competitive</p> <p>09:42:44 5 justifications for the collusive agreement, and the</p> <p>09:42:48 6 Court found there were none. So, therefore, I didn't</p> <p>09:42:50 7 have to get into an analysis of the potential</p> <p>09:42:53 8 pro-competitive justifications.</p> <p>09:42:54 9 <b>Q. Would Amazon have implemented a 70 percent</b></p> <p>09:42:57 10 <b>royalty option under the Kindle direct publishing</b></p> <p>09:43:01 11 <b>platform for self-publishers in the but-for world?</b></p> <p>09:43:05 12 MR. FRIEDMAN: Objection, form.</p> <p>09:43:07 13 <b>THE WITNESS: I have no idea what they would</b></p> <p>09:43:09 14 <b>have adopted in the but-for world in terms of the</b></p> <p>09:43:10 15 specific contract form with independent publishers.</p> <p>09:43:13 16 The issue is not -- that I'm addressing is what the</p> <p>09:43:18 17 price would be of those books, not what the impact</p> <p>09:43:21 18 for the publisher would be.</p> <p>09:43:23 19 <b>Q. MR. SWANSON: Did you investigate how</b></p> <p>09:43:24 20 <b>retailers determine their pricing under the wholesale</b></p> <p>09:43:27 21 <b>model?</b></p> <p>09:43:27 22 A. Yes, I reference the discovery material from</p> <p>09:43:38 23 Amazon and I think Barnes &amp; Noble within the report</p> <p>09:43:41 24 about how they did pricing, and that fed into how I</p> <p>09:43:46 25 constructed the econometric model of pricing. I</p> | <p style="text-align: right;">60</p> <p>09:45:22 1 elements in Amazon's model is what's the price at</p> <p>09:45:27 2 Barnes &amp; Noble, like just as at Barnes &amp; Noble one of</p> <p>09:45:31 3 the elements is what's the price at Amazon.</p> <p>09:45:33 4 So it isn't -- the model is a reduced form</p> <p>09:45:38 5 pricing model that has both supply and demand</p> <p>09:45:42 6 characteristics in it. It isn't intended to be -- it</p> <p>09:45:44 7 is intended to be a marketing, delivery and price</p> <p>09:45:48 8 estimated through a reduced form model. It's not</p> <p>09:45:51 9 intending to be anybody's pricing algorithm.</p> <p>09:45:53 10 <b>Q. Have you ever had access to the algorithms</b></p> <p>09:45:58 11 <b>used by Amazon for e-book pricing?</b></p> <p>09:46:00 12 A. I don't have -- I have not seen the actual</p> <p>09:46:03 13 algorithms, no.</p> <p>09:46:04 14 <b>Q. Are you aware whether Amazon produced any</b></p> <p>09:46:09 15 <b>document showing its precise methodology for</b></p> <p>09:46:11 16 <b>determining e-book prices?</b></p> <p>09:46:12 17 A. I don't remember whether they did or didn't.</p> <p>09:46:14 18 I mean, it would be irrelevant anyway since they base</p> <p>09:46:16 19 it on Barnes &amp; Noble prices. So that tells me that</p> <p>09:46:20 20 whatever their algorithm spits out, if the price</p> <p>09:46:23 21 that's spit out is higher than Barnes &amp; Noble, they</p> <p>09:46:26 22 will set the price equal to Barnes &amp; Noble price.</p> <p>09:46:29 23 So for my purposes recreating their pricing</p> <p>09:46:33 24 formula wouldn't be accurate. It would tend to</p> <p>09:46:36 25 produce an imprecise and incorrect estimate of</p> |
| <p style="text-align: right;">59</p> <p>09:43:51 1 wanted to make it consistent with Amazon's model.</p> <p>09:43:54 2 <b>Q. And are you aware that Amazon invested</b></p> <p>09:43:58 3 <b>substantial time and money in developing a system for</b></p> <p>09:44:00 4 <b>setting the retail price of e-books?</b></p> <p>09:44:02 5 MR. FRIEDMAN: Objection, form.</p> <p>09:44:03 6 THE WITNESS: I -- obviously it takes time</p> <p>09:44:09 7 and money to develop a pricing algorithm, yes. That</p> <p>09:44:15 8 fact played no role in anything I did.</p> <p>09:44:17 9 <b>Q. MR. SWANSON: You do refer at multiple points</b></p> <p>09:44:22 10 <b>in your report to Amazon's pricing formula or pricing</b></p> <p>09:44:26 11 <b>algorithm, don't you?</b></p> <p>09:44:28 12 A. Yes.</p> <p>09:44:29 13 <b>Q. And what do you mean by that?</b></p> <p>09:44:31 14 A. What I mean by that is a way of classifying</p> <p>09:44:37 15 books by how long they've been out, what kind of book</p> <p>09:44:42 16 they are, what their retail price is and mapping that</p> <p>09:44:46 17 into an e-book price on Amazon.</p> <p>09:44:49 18 <b>Q. Does your model attempt to reflect then</b></p> <p>09:44:56 19 <b>Amazon's pricing algorithm?</b></p> <p>09:45:00 20 A. It wouldn't be Amazon's pricing algorithm,</p> <p>09:45:05 21 no. It would -- it's a model that takes into account</p> <p>09:45:09 22 the factors that Amazon took into account. So it's</p> <p>09:45:13 23 not intended to be anybody's pricing algorithm,</p> <p>09:45:16 24 because price in a market is the result of</p> <p>09:45:19 25 competitive interactions among firms, and one of the</p>                                                         | <p style="text-align: right;">61</p> <p>09:46:40 1 pricing because it wouldn't be just the book</p> <p>09:46:45 2 characteristics that were taken into account. It</p> <p>09:46:48 3 would be market conditions as well.</p> <p>09:46:49 4 <b>Q. Are you aware that Amazon considers its</b></p> <p>09:46:54 5 <b>methodologies for determining e-book prices to be</b></p> <p>09:46:57 6 <b>among its most closely guarded trade secrets?</b></p> <p>09:47:01 7 MR. FRIEDMAN: Objection, form.</p> <p>09:47:03 8 THE WITNESS: I'm not surprised that that</p> <p>09:47:05 9 would be true, but I don't recall having known that</p> <p>09:47:07 10 and it doesn't play any role in my analysis.</p> <p>09:47:09 11 <b>Q. MR. SWANSON: Are you aware that access to</b></p> <p>09:47:11 12 <b>such information is restricted even within Amazon?</b></p> <p>09:47:14 13 MR. FRIEDMAN: Same objection.</p> <p>09:47:15 14 THE WITNESS: Again, I'm not surprised that's</p> <p>09:47:18 15 true. I don't recall ever having read those words,</p> <p>09:47:20 16 but if you would have asked me do I think they keep</p> <p>09:47:23 17 this stuff confidential, I would have said yes,</p> <p>09:47:27 18 because almost everybody keeps their pricing</p> <p>09:47:29 19 algorithm confidential, including Apple.</p> <p>09:47:31 20 <b>Q. MR. SWANSON: Do you claim to understand how</b></p> <p>09:47:34 21 <b>Amazon's pricing formula operated during the period</b></p> <p>09:47:37 22 <b>from 2008 through 2012?</b></p> <p>09:47:41 23 A. Only insofar as revealed in the report, which</p> <p>09:47:43 24 is to identify variables that they claimed to take</p> <p>09:47:46 25 into account and then to see if they in fact do</p>                   |

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| <p style="text-align: right;">62</p> <p>09:47:49 1 affect prices in the model.</p> <p>09:47:51 2 <b>Q. Are you aware that Google attempted to</b></p> <p>09:47:54 3 <b>backward engineer Amazon's pricing formula and</b></p> <p>09:48:00 4 <b>failed?</b></p> <p>09:48:00 5 MR. FRIEDMAN: Objection, form.</p> <p>09:48:01 6 THE WITNESS: No. I don't know that that's</p> <p>09:48:04 7 true, but, again, it doesn't matter.</p> <p>09:48:07 8 <b>Q. MR. SWANSON: Is Amazon's pricing formula</b></p> <p>09:48:10 9 <b>static or dynamic?</b></p> <p>09:48:12 10 MR. FRIEDMAN: Objection, form.</p> <p>09:48:13 11 THE WITNESS: What do you mean by static</p> <p>09:48:15 12 versus dynamic?</p> <p>09:48:17 13 <b>Q. MR. SWANSON: Well, does it change</b></p> <p>09:48:19 14 <b>frequently? Let's start with that.</b></p> <p>09:48:20 15 MR. FRIEDMAN: Form.</p> <p>09:48:21 16 THE WITNESS: I don't know what the actual</p> <p>09:48:24 17 algorithm is. All I know is the factors that they</p> <p>09:48:30 18 take into account. So I wouldn't be able to answer</p> <p>09:48:36 19 any question at all about their proprietary company</p> <p>09:48:39 20 information. All I know is what variables they say</p> <p>09:48:42 21 are important.</p> <p>09:48:42 22 <b>Q. MR. SWANSON: Well, where --</b></p> <p>09:48:45 23 A. And I suspect those do change through time,</p> <p>09:48:48 24 but it doesn't matter to me. All that matters is</p> <p>09:48:51 25 that I have the variables that are -- that are</p>                                                                                                                                                                                   | <p style="text-align: right;">64</p> <p>09:50:18 1 applying that to all retailers, not just Amazon</p> <p>09:50:22 2 because the nature of the competitive process would</p> <p>09:50:25 3 be if one of them prices on that basis, the others</p> <p>09:50:28 4 will, too, if for no other reason that everybody</p> <p>09:50:33 5 looks at everybody else's price to set their own</p> <p>09:50:36 6 price.</p> <p>09:50:37 7 <b>Q. MR. SWANSON: How does Amazon's pricing</b></p> <p>09:50:39 8 <b>algorithm or formula incorporate the price of hard</b></p> <p>09:50:42 9 <b>copy books?</b></p> <p>09:50:43 10 MR. FRIEDMAN: Objection, form.</p> <p>09:50:44 11 THE WITNESS: I don't know. I don't know</p> <p>09:50:45 12 anything about their algorithm. All I know is that</p> <p>09:50:53 13 there's documents that say that might be important.</p> <p>09:50:55 14 So I let the econometrics speak for itself as to</p> <p>09:50:58 15 whether that's important.</p> <p>09:50:59 16 <b>Q. MR. SWANSON: Do you know how Amazon's</b></p> <p>09:51:03 17 <b>pricing formula treats the genre as a factor that</b></p> <p>09:51:06 18 <b>influences pricing?</b></p> <p>09:51:08 19 MR. FRIEDMAN: Objection, form.</p> <p>09:51:08 20 THE WITNESS: I do not know anything about</p> <p>09:51:10 21 the actual pricing algorithm they use. I'm not</p> <p>09:51:14 22 attempting to recreate the pricing algorithm of</p> <p>09:51:16 23 Amazon.</p> <p>09:51:17 24 <b>Q. MR. SWANSON: Does the Amazon pricing formula</b></p> <p>09:51:21 25 <b>or algorithm charge the same price for the same title</b></p>                                                                                                         |
| <p style="text-align: right;">63</p> <p>09:48:53 1 important in my -- I test in the equation the extent</p> <p>09:48:58 2 to which the factors that I see in these discovery</p> <p>09:49:02 3 documents to see if they affect price, but that</p> <p>09:49:05 4 doesn't mean that they reproduce the pricing</p> <p>09:49:07 5 algorithm. I'm not trying to reproduce the pricing</p> <p>09:49:10 6 algorithm.</p> <p>09:49:10 7 <b>Q. What are the variables used in Amazon's</b></p> <p>09:49:14 8 <b>pricing algorithm?</b></p> <p>09:49:14 9 A. Well, one of the ones that I focus on</p> <p>09:49:17 10 especially is the 90-day new release window, which is</p> <p>09:49:22 11 somewhat different than the industry definition. And</p> <p>09:49:27 12 so that's one. But they also take into account genre</p> <p>09:49:33 13 and, as I said before, retail price, what the status</p> <p>09:49:37 14 of hardback -- hard copy releases are, things like</p> <p>09:49:40 15 that.</p> <p>09:49:40 16 <b>Q. Focusing on the 90-day new release, Amazon's</b></p> <p>09:49:46 17 <b>pricing algorithm didn't always treat new releases in</b></p> <p>09:49:51 18 <b>a particular way for the first 90 days only, did it?</b></p> <p>09:49:57 19 MR. FRIEDMAN: Objection, form.</p> <p>09:49:58 20 THE WITNESS: Again, I don't know what's</p> <p>09:50:00 21 inside their actual algorithm. All I know is what</p> <p>09:50:04 22 the documents say about what kinds of variable they</p> <p>09:50:07 23 consider. And so I have this 90-day variable in</p> <p>09:50:10 24 there as a way to try to capture as much as I can</p> <p>09:50:15 25 what's happening in terms of retail pricing, but I'm</p> | <p style="text-align: right;">65</p> <p>09:51:25 1 <b>at the same time to all buyers?</b></p> <p>09:51:26 2 MR. FRIEDMAN: Objection, form.</p> <p>09:51:28 3 THE WITNESS: There -- there is a common</p> <p>09:51:34 4 price, but sometimes there's -- Amazon offers deals</p> <p>09:51:39 5 to people, but I do not know the degree to which that</p> <p>09:51:42 6 applies to e-books. I know it applies to hard copy</p> <p>09:51:45 7 books. I do not know the degree to which they have</p> <p>09:51:48 8 special deals with respect to e-book prices. I've</p> <p>09:51:53 9 seen no evidence of that in the data.</p> <p>09:51:59 10 <b>Q. MR. SWANSON: Isn't it a fact that Amazon</b></p> <p>09:52:01 11 <b>engages in price discrimination and charges different</b></p> <p>09:52:04 12 <b>consumers at the same time different prices for the</b></p> <p>09:52:07 13 <b>same e-books?</b></p> <p>09:52:08 14 MR. FRIEDMAN: Objection, form.</p> <p>09:52:10 15 THE WITNESS: You have to explain -- describe</p> <p>09:52:15 16 to me exactly what you mean by engaging in price</p> <p>09:52:19 17 discrimination here. What are you referring to that</p> <p>09:52:22 18 you are calling price discrimination? Because price</p> <p>09:52:26 19 discrimination has an economic meaning that is pretty</p> <p>09:52:32 20 complicated. So I want to know what you mean by</p> <p>09:52:34 21 that.</p> <p>09:52:35 22 <b>Q. MR. SWANSON: Well, we can strike that from</b></p> <p>09:52:36 23 <b>the sentence. Isn't it true that Amazon with</b></p> <p>09:52:39 24 <b>regularity during the class period charged different</b></p> <p>09:52:42 25 <b>consumers different prices at the same time for the</b></p> |



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| <p>66</p> <p>09:52:45 1 same title?</p> <p>09:52:46 2 MR. FRIEDMAN: Objection, form.</p> <p>09:52:48 3 THE WITNESS: I am not aware of that being</p> <p>09:52:52 4 true for e-books. I'm not aware of data that suggest</p> <p>09:52:58 5 it's true, other than what I've discussed before,</p> <p>09:53:00 6 which is the presence of some short-term discounts</p> <p>09:53:03 7 for specific things.</p> <p>09:53:04 8 <b>Q. MR. SWANSON: Let's take backlist pricing. You've got data that show all the prices that Amazon charged, correct?</b></p> <p>09:53:07 9 A. Yes.</p> <p>09:53:11 10 <b>Q. And you can look at any given day and find out if Amazon charged all the consumers who bought a particular title the exact same price, correct?</b></p> <p>09:53:14 11 A. In principle, you could do a histogram of</p> <p>09:53:17 12 that, yes. In practice, the number of data points is</p> <p>09:53:20 13 so large, in the time frame I had I couldn't do that.</p> <p>09:53:23 14 <b>Q. Have you looked at any of those questions as to whether or not Amazon charges the same price to the same consumers for the same title?</b></p> <p>09:53:25 15 A. I don't know the answer to the question, do</p> <p>09:53:28 16 they engage in price differences in the same day for</p> <p>09:53:30 17 different consumers. I do not know the answer to</p> <p>09:53:33 18 that.</p> <p>09:53:35 19 <b>Q. That's an easy question to answer given the</b></p>                         | <p>68</p> <p>09:55:00 1 MR. FRIEDMAN: Objection, form.</p> <p>09:55:01 2 THE WITNESS: I have no clue what's inside</p> <p>09:55:03 3 the Amazon pricing algorithm because it's not -- it's</p> <p>09:55:07 4 proprietary.</p> <p>09:55:09 5 Can we take a break soon?</p> <p>09:55:10 6 MR. SWANSON: Oh, yeah. We can take it at</p> <p>09:55:13 7 any time.</p> <p>09:55:15 8 VIDEOGRAPHER: This now marks the ending of</p> <p>09:55:18 9 tape labeled as number one of Roger Noll. We are now</p> <p>09:55:22 10 going off the record. The time is 9:54.</p> <p>10:02:47 11 (Deposition recess taken.)</p> <p>10:09:55 12 VIDEOGRAPHER: This now marks the beginning</p> <p>10:10:09 13 of tape labeled number two in the videotaped</p> <p>10:10:13 14 deposition of Roger Noll. We are now going back on</p> <p>10:10:16 15 the record, the time is 10:09.</p> <p>10:10:18 16 <b>Q. MR. SWANSON: Professor, do you understand that Amazon priced its e-books based in part on the title's digital list price?</b></p> <p>10:10:20 17 A. Digital list price. By that you mean the</p> <p>10:10:26 18 list price of an e-book by the publisher?</p> <p>10:10:36 19 <b>Q. Correct.</b></p> <p>10:10:43 20 A. Well, I think there is a relation -- the</p> <p>10:10:53 21 physical copy price and the list price are related to</p> <p>10:10:54 22 each other. So the answer would have to be yes. And</p> <p>10:11:08 23 if there is no physical copy price, then it would be</p> <p>10:11:11 24</p> <p>10:11:15 25</p> |
| <p>67</p> <p>09:53:47 1 data you have?</p> <p>09:53:48 2 A. No, it's a very hard question to answer</p> <p>09:53:50 3 because the data is so large. Yes, in principle one</p> <p>09:53:54 4 could do it, but because of the size of the data set,</p> <p>09:53:57 5 it's difficult.</p> <p>09:53:57 6 <b>Q. Was that an important question for purposes of your opinions here?</b></p> <p>09:53:59 7 A. No, because if what they give is certain</p> <p>09:54:01 8 people in certain circumstances get percentage</p> <p>09:54:04 9 discounts, it's still -- it's still a percentage</p> <p>09:54:07 10 discount off of an elevated list price. So there</p> <p>09:54:11 11 would still be elevation of price.</p> <p>09:54:14 12 <b>Q. What leads you to speak in terms of percentage discounts in that response?</b></p> <p>09:54:16 13 A. Because that's what I'm aware of</p> <p>09:54:20 14 independently, the kinds of things that Amazon does.</p> <p>09:54:22 15 But, again, I've seen nothing in the record that</p> <p>09:54:24 16 systematic gives me an insight into the extent to</p> <p>09:54:28 17 which there is anything other than just that</p> <p>09:54:34 18 occasional percentage discount offers to specific</p> <p>09:54:40 19 customers.</p> <p>09:54:43 20 <b>Q. So you, for example, don't know if the Amazon pricing algorithm adds two or three cents to a particular consumer's price compared to another consumer's price as opposed to a percentage?</b></p> | <p>69</p> <p>10:11:18 1 the e-book list price, yes.</p> <p>10:11:21 2 So -- but that's, again -- I haven't done</p> <p>10:11:27 3 a -- I don't know what they actually do inside their</p> <p>10:11:29 4 algorithm, so I can't answer to what they actually</p> <p>10:11:32 5 do.</p> <p>10:11:33 6 <b>Q. Did you have access to digital list price data?</b></p> <p>10:11:37 7 A. I don't remember whether we had digital list</p> <p>10:11:37 8 price data or not. It's too long ago.</p> <p>10:11:42 9 <b>Q. Did you include digital list prices in your model?</b></p> <p>10:11:45 10 A. I don't believe we did.</p> <p>10:11:51 11 <b>Q. Do you have an understanding as to whether digital list prices generally changed when a title shifted from a hard cover to a trade paperback version?</b></p> <p>10:11:52 12 A. Yes, we do have that shift in the model, yes.</p> <p>10:11:55 13 So that would be -- to the extent the price did</p> <p>10:11:59 14 depend on the existence of a paperback edition, yes,</p> <p>10:12:02 15 we have that in the model.</p> <p>10:12:03 16 <b>Q. And do you understand that digital list prices generally changed when a title shifted from a trade paperback to a mass market version?</b></p> <p>10:12:07 17 MR. FRIEDMAN: Object to form.</p> <p>10:12:11 18 THE WITNESS: I believe that -- I believe</p> <p>10:12:14 19</p> <p>10:12:15 20</p> <p>10:12:20 21</p> <p>10:12:23 22</p> <p>10:12:26 23</p> <p>10:12:28 24</p>                                               |



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| <p style="text-align: right;">74</p> <p>10:17:06 1 A. The collusive version of the agency model</p> <p>10:17:10 2 became effective for some publishers on April 1st.</p> <p>10:17:16 3 <b>Q. And the agency agreements between the</b></p> <p>10:17:20 4 <b>defendant publishers and Apple were signed in</b></p> <p>10:17:23 5 <b>January 2010, correct?</b></p> <p>10:17:23 6 MR. FRIEDMAN: Objection, form.</p> <p>10:17:24 7 THE WITNESS: I haven't memorized the dates.</p> <p>10:17:26 8 They're in the record, and I will let the record</p> <p>10:17:29 9 speak for itself. It plays no role in my analysis.</p> <p>10:17:32 10 <b>Q. MR. SWANSON: Was the 9.99 price point for</b></p> <p>10:17:37 11 <b>new releases under the wholesale model generally</b></p> <p>10:17:42 12 <b>above or below incremental cost?</b></p> <p>10:17:45 13 MR. FRIEDMAN: Objection, form.</p> <p>10:17:47 14 THE WITNESS: Sometimes above, sometimes</p> <p>10:17:49 15 below.</p> <p>10:17:51 16 <b>Q. MR. SWANSON: Under what circumstances do</b></p> <p>10:17:54 17 <b>economists expect rational, profit-maximizing</b></p> <p>10:17:57 18 <b>retailers to set prices below incremental cost?</b></p> <p>10:18:02 19 A. Promotional.</p> <p>10:18:03 20 <b>Q. Any other circumstances that you can think</b></p> <p>10:18:06 21 <b>of?</b></p> <p>10:18:07 22 A. Why don't you ask me a question? I mean,</p> <p>10:18:15 23 pricing has to do with costs and pricing has to do</p> <p>10:18:19 24 with advertising, and so I would expect both of those</p> <p>10:18:24 25 things to affect how pricing was set.</p>                                                                                                                                                                                | <p style="text-align: right;">76</p> <p>10:19:50 1 <b>in the but-for world?</b></p> <p>10:19:51 2 MR. FRIEDMAN: Objection, form.</p> <p>10:19:53 3 THE WITNESS: I would expect that people who</p> <p>10:19:58 4 are engaged in e-book retailing would make money on</p> <p>10:20:01 5 the fact they were e-book retailing or get out of the</p> <p>10:20:05 6 business, yes.</p> <p>10:20:05 7 <b>Q. MR. SWANSON: And is it your expectation that</b></p> <p>10:20:10 8 <b>in the but-for world Amazon's profitability would be</b></p> <p>10:20:15 9 <b>positive with respect to the sale of trade e-books?</b></p> <p>10:20:20 10 MR. FRIEDMAN: Objection, form.</p> <p>10:20:22 11 THE WITNESS: I would expect them to be</p> <p>10:20:27 12 profitable selling e-books in general. With respect</p> <p>10:20:30 13 to any specific product, no, I wouldn't expect</p> <p>10:20:33 14 anything about whether that product was profitable or</p> <p>10:20:35 15 not.</p> <p>10:20:36 16 <b>Q. MR. SWANSON: Any specific title?</b></p> <p>10:20:37 17 A. Or even specific category. Yes, overall</p> <p>10:20:40 18 profitability. No with respect to any specific</p> <p>10:20:44 19 thing.</p> <p>10:20:44 20 <b>Q. Have you analyzed whether Amazon was losing</b></p> <p>10:20:51 21 <b>money on e-books before April 1st, 2010?</b></p> <p>10:20:54 22 MR. FRIEDMAN: Objection, form.</p> <p>10:20:55 23 THE WITNESS: I have undertaken no</p> <p>10:20:56 24 independent analysis of the financial condition of</p> <p>10:20:58 25 Amazon's e-book business.</p>                                                          |
| <p style="text-align: right;">75</p> <p>10:18:30 1 <b>Q. Right. And understand that for promotional</b></p> <p>10:18:33 2 <b>reasons a rational, profit-maximizing retailer could</b></p> <p>10:18:39 3 <b>set price below incremental cost. Are there any</b></p> <p>10:18:43 4 <b>other reasons or circumstances you can think of as an</b></p> <p>10:18:45 5 <b>economist why such a retailer would do that?</b></p> <p>10:18:47 6 A. The defendants in this case claimed that</p> <p>10:18:49 7 Amazon was engaged in predatory pricing, but that was</p> <p>10:18:52 8 rejected by the Court.</p> <p>10:18:54 9 <b>Q. Any other circumstances you can think of</b></p> <p>10:18:57 10 <b>other than promotional reasons or predatory pricing?</b></p> <p>10:19:00 11 A. Not that I -- I'm aware of. Maybe I'm just</p> <p>10:19:06 12 forgetting something that you can tell me about. I</p> <p>10:19:09 13 don't know that it would play any role in my report,</p> <p>10:19:11 14 but if you want to ask me a question about something</p> <p>10:19:13 15 else, I can, A, say whether I've thought about it</p> <p>10:19:17 16 and, B, say whether it would play any role in</p> <p>10:19:20 17 estimating damages.</p> <p>10:19:21 18 <b>Q. Are you assuming that Amazon would continue</b></p> <p>10:19:23 19 <b>to price some e-books below incremental cost in the</b></p> <p>10:19:27 20 <b>but-for world to the same extent that it had in the</b></p> <p>10:19:30 21 <b>actual world?</b></p> <p>10:19:30 22 A. I see no reason to believe that there would</p> <p>10:19:36 23 be a change in Amazon's pricing policy on April 1st</p> <p>10:19:40 24 other than the implementation of the agency model.</p> <p>10:19:44 25 <b>Q. Overall, would Amazon make money on e-books</b></p> | <p style="text-align: right;">77</p> <p>10:21:00 1 <b>Q. MR. SWANSON: Did you analyze whether Amazon</b></p> <p>10:21:05 2 <b>was making money on Kindle devices before the</b></p> <p>10:21:08 3 <b>conspiracy period?</b></p> <p>10:21:09 4 A. I have undertaken no independent analysis of</p> <p>10:21:11 5 the profitability of their device business for the</p> <p>10:21:16 6 purposes of writing my report.</p> <p>10:21:18 7 <b>Q. Would you take issue with the</b></p> <p>10:21:22 8 <b>characterization that Amazon before the agency</b></p> <p>10:21:25 9 <b>agreements was at best breaking even on e-books?</b></p> <p>10:21:27 10 MR. FRIEDMAN: Objection, form.</p> <p>10:21:28 11 THE WITNESS: I have again taken no -- done</p> <p>10:21:32 12 no independent analysis of whether they were or were</p> <p>10:21:34 13 not making money on Kindles before and after the</p> <p>10:21:37 14 agency agreement.</p> <p>10:21:38 15 <b>Q. MR. SWANSON: Or e-books?</b></p> <p>10:21:39 16 A. Or e-books.</p> <p>10:21:41 17 <b>Q. Would you expect Amazon's pricing strategy</b></p> <p>10:21:48 18 <b>with respect to e-books sold on the wholesale model</b></p> <p>10:21:52 19 <b>to be different in the but-for world than in the</b></p> <p>10:21:54 20 <b>actual world?</b></p> <p>10:21:56 21 MR. FRIEDMAN: Objection, form.</p> <p>10:21:58 22 THE WITNESS: I have no clue what that</p> <p>10:22:00 23 question means. What do you mean by actual world?</p> <p>10:22:06 24 The but-for world is supposed to be a guess about</p> <p>10:22:08 25 what the actual world would look like in the absence</p> |

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| <p style="text-align: right;">82</p> <p>10:27:34 1 good with assumptions.</p> <p>10:27:35 2 <b>So if you assumed that Barnes &amp; Noble could</b></p> <p>10:27:38 3 <b>not continue to match Amazon's prices in the but-for</b></p> <p>10:27:41 4 <b>world, how would that affect your modeling?</b></p> <p>10:27:44 5 MR. FRIEDMAN: Objection, form.</p> <p>10:27:45 6 THE WITNESS: If I assume that and I also</p> <p>10:27:47 7 assume that the market is competitive, then I would</p> <p>10:27:50 8 be predicting that Barnes &amp; Noble would exit the</p> <p>10:27:53 9 industry and the only firm left would be Amazon and</p> <p>10:27:56 10 it would be true of everybody else. So Amazon would</p> <p>10:27:59 11 start to be a complete monopolist because the -- it's</p> <p>10:28:07 12 the competitive process that determines the price,</p> <p>10:28:09 13 and Barnes &amp; Noble would be unsuccessful if it</p> <p>10:28:13 14 systematically priced above Amazon.</p> <p>10:28:14 15 <b>Q. MR. SWANSON: Have you made any evaluation as</b></p> <p>10:28:16 16 <b>to whether or not Barnes &amp; Noble's e-book business</b></p> <p>10:28:20 17 <b>would be profitable in the but-for world?</b></p> <p>10:28:23 18 MR. FRIEDMAN: Objection.</p> <p>10:28:23 19 THE WITNESS: I have undertaken no</p> <p>10:28:25 20 independent analysis of Barnes &amp; Noble's</p> <p>10:28:27 21 profitability, and it's irrelevant to anything I did</p> <p>10:28:29 22 in my report.</p> <p>10:28:30 23 <b>Q. MR. SWANSON: So if under the prices that</b></p> <p>10:28:33 24 <b>would prevail in the but-for world Barnes &amp; Noble</b></p> <p>10:28:36 25 <b>would be losing substantial amounts of money, in your</b></p> | <p style="text-align: right;">84</p> <p>10:29:55 1 and as part of the deal to generate a minimum retail</p> <p>10:29:59 2 price margin because their objective here, as stated</p> <p>10:30:04 3 in my report derived from the opinion, was to protect</p> <p>10:30:07 4 sales of hard copies.</p> <p>10:30:09 5 So their profit calculation is based in part</p> <p>10:30:12 6 on the price of e-books and in part on the sales and</p> <p>10:30:15 7 prices of hard copies. What they wanted to do was</p> <p>10:30:18 8 protect -- arrest the decline in the sale of hard</p> <p>10:30:21 9 copies.</p> <p>10:30:23 10 <b>Q. MR. SWANSON: And so you understood that in</b></p> <p>10:30:27 11 <b>the actual world as part of the unlawful conduct the</b></p> <p>10:30:32 12 <b>publisher defendants took wholesale prices to a lower</b></p> <p>10:30:35 13 <b>level?</b></p> <p>10:30:35 14 MR. FRIEDMAN: Objection, form.</p> <p>10:30:36 15 THE WITNESS: No, that's not what I said. I</p> <p>10:30:38 16 said that in some cases they actually cut the price</p> <p>10:30:41 17 as part of the collusive agreement. So the pricing</p> <p>10:30:44 18 model I'm assuming is the one that -- a continuation</p> <p>10:30:48 19 of the one that was in place prior to the institution</p> <p>10:30:51 20 of the collusive agreement.</p> <p>10:30:52 21 <b>Q. MR. SWANSON: I think one of us may have</b></p> <p>10:30:55 22 <b>misunderstood the other. I said took wholesale</b></p> <p>10:30:59 23 <b>prices to a lower level. That is, I think, what</b></p> <p>10:31:01 24 <b>you're saying.</b></p> <p>10:31:02 25 A. You said under competition in the but-for</p>                        |
| <p style="text-align: right;">83</p> <p>10:28:39 1 <b>view, that's irrelevant to the assessment of damages?</b></p> <p>10:28:41 2 A. Yes.</p> <p>10:28:42 3 <b>Q. In your view, did the agency model eliminate</b></p> <p>10:28:51 4 <b>all retail price competition in the trade e-books</b></p> <p>10:28:55 5 <b>market?</b></p> <p>10:28:55 6 MR. FRIEDMAN: Objection, form.</p> <p>10:28:58 7 THE WITNESS: It didn't eliminate competition</p> <p>10:29:01 8 among publishers that were not part of the</p> <p>10:29:04 9 conspiracy. It probably reduced its intensity and</p> <p>10:29:08 10 caused prices to be somewhat higher. So I haven't</p> <p>10:29:12 11 modeled that. So I underestimate damages.</p> <p>10:29:15 12 <b>Q. MR. SWANSON: Would the publisher defendants</b></p> <p>10:29:17 13 <b>have competed with each other on the wholesale price</b></p> <p>10:29:20 14 <b>of release e-books in the but-for world?</b></p> <p>10:29:22 15 MR. FRIEDMAN: Objection, form.</p> <p>10:29:23 16 THE WITNESS: Again, I haven't done an</p> <p>10:29:29 17 independent analysis of the intensity of competition,</p> <p>10:29:33 18 but I presume that in the absence of collusion they</p> <p>10:29:37 19 have competed as they had before the collusion</p> <p>10:29:39 20 started, yes.</p> <p>10:29:40 21 <b>Q. MR. SWANSON: So would you expect lower</b></p> <p>10:29:42 22 <b>wholesale prices in the but-for world?</b></p> <p>10:29:44 23 A. Actually, the nature of the competition was</p> <p>10:29:48 24 different in this case because they made a sacrifice</p> <p>10:29:51 25 in wholesale prices of e-books in order to induce --</p>                                                                      | <p style="text-align: right;">85</p> <p>10:31:04 1 world. The answer to that, if the prices were</p> <p>10:31:07 2 lowered because of the collusive agreement for some</p> <p>10:31:09 3 books, obviously they wouldn't be lower still in the</p> <p>10:31:13 4 absence. Maybe some e-book prices at the wholesale</p> <p>10:31:17 5 level would have been higher in the absence of a</p> <p>10:31:19 6 collusive agreement. But our interest here is not</p> <p>10:31:21 7 what the wholesale price was. Our interest here is</p> <p>10:31:25 8 what the retail price was.</p> <p>10:31:27 9 <b>Q. In the real world, what you call the</b></p> <p>10:31:29 10 <b>collusive world, did wholesale prices drop for</b></p> <p>10:31:32 11 <b>nondefendant publishers as well?</b></p> <p>10:31:34 12 MR. FRIEDMAN: Objection, form.</p> <p>10:31:36 13 THE WITNESS: The model takes into account a</p> <p>10:31:41 14 general declining trend in e-book prices by having a</p> <p>10:31:45 15 time variable in there, yes.</p> <p>10:31:46 16 <b>Q. MR. SWANSON: And would the market wholesale</b></p> <p>10:31:50 17 <b>price have been that low absent the collusion?</b></p> <p>10:31:53 18 MR. FRIEDMAN: Objection, form.</p> <p>10:31:54 19 THE WITNESS: What wholesale market price?</p> <p>10:31:58 20 Again, it's a very vague and general question, and I</p> <p>10:32:01 21 want to know what exactly you're talking about.</p> <p>10:32:03 22 <b>Q. MR. SWANSON: So there is no market wholesale</b></p> <p>10:32:06 23 <b>price, in your view, for trade e-books?</b></p> <p>10:32:08 24 MR. FRIEDMAN: Objection, form.</p> <p>10:32:09 25 THE WITNESS: There's market wholesale prices</p> |

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| <p style="text-align: right;">86</p> <p>10:32:11 1 at the level of a book, and there is something about</p> <p>10:32:14 2 average prices, but I -- your question was vague</p> <p>10:32:16 3 about what you meant. All right? And so you're</p> <p>10:32:19 4 going to have to clarify it for me before I can</p> <p>10:32:24 5 answer the question.</p> <p>10:32:24 6 <b>Q. MR. SWANSON: Well, let's speak in terms of</b></p> <p>10:32:27 7 <b>average wholesale prices. Are you aware of what the</b></p> <p>10:32:31 8 <b>average wholesale price was in the trade e-books</b></p> <p>10:32:34 9 <b>market?</b></p> <p>10:32:34 10 A. There are calculations done by Dr. Burtis</p> <p>10:32:37 11 about that, but they don't take into account</p> <p>10:32:39 12 compositional effects. So you can have a change in</p> <p>10:32:43 13 average price because on average prices are changing</p> <p>10:32:45 14 or you can have a change because the composition of</p> <p>10:32:47 15 sales is changing among higher priced versus lower</p> <p>10:32:53 16 priced categories.</p> <p>10:32:55 17 So, again, what you mean by average depends</p> <p>10:32:58 18 on which of those you're interested in. Are you</p> <p>10:33:00 19 talking about a price index, or are you talking about</p> <p>10:33:02 20 an average price that takes into account shifts in</p> <p>10:33:05 21 composition.</p> <p>10:33:06 22 MR. FRIEDMAN: I don't want to interrupt. I</p> <p>10:33:09 23 just want to make sure, were you talking wholesale</p> <p>10:33:11 24 price or retail price in your answer?</p> <p>10:33:14 25 THE WITNESS: Either one. Both would be</p>                                                                        | <p style="text-align: right;">88</p> <p>10:34:37 1 A. You said Random House.</p> <p>10:34:39 2 <b>Q. I apologize.</b></p> <p>10:34:40 3 MR. FRIEDMAN: I think you said Amazon, but</p> <p>10:34:42 4 restate it.</p> <p>10:34:43 5 THE WITNESS: I'm having trouble parsing it</p> <p>10:34:45 6 out.</p> <p>10:34:46 7 MR. SWANSON: No problem. And I'm entirely</p> <p>10:34:48 8 capable of misstating it. So I'm sure Mr. Friedman</p> <p>10:34:51 9 will keep me honest.</p> <p>10:34:53 10 THE WITNESS: Don't trust him for that.</p> <p>10:34:54 11 MR. SWANSON: All right. We'll stipulate.</p> <p>10:34:59 12 MR. FRIEDMAN: Objection to both of you.</p> <p>10:35:03 13 <b>Q. MR. SWANSON: All right. Let me try it</b></p> <p>10:35:06 14 <b>again. In the but-for world, would Amazon have a</b></p> <p>10:35:08 15 <b>higher or lower share of the relevant market than it</b></p> <p>10:35:11 16 <b>had in the real world?</b></p> <p>10:35:15 17 MR. FRIEDMAN: Objection, form.</p> <p>10:35:16 18 THE WITNESS: I haven't addressed that</p> <p>10:35:18 19 question. I've done no analysis of it. It has no</p> <p>10:35:21 20 relevance to my report.</p> <p>10:35:22 21 <b>Q. MR. SWANSON: You don't have an expectation</b></p> <p>10:35:24 22 <b>based on the things that you have analyzed?</b></p> <p>10:35:27 23 A. No, I actually do not have an expectation.</p> <p>10:35:30 24 It's an empirical question, not a theoretical</p> <p>10:35:33 25 question. So I don't -- I can't really address it.</p>                                                                                                                                                                                                              |
| <p style="text-align: right;">87</p> <p>10:33:17 1 true, but I understand he asked me about wholesale.</p> <p>10:33:20 2 <b>Q. MR. SWANSON: In the but-for world, would</b></p> <p>10:33:24 3 <b>Amazon and other retailers continue to rely on</b></p> <p>10:33:26 4 <b>wholesale contracts with publishers?</b></p> <p>10:33:28 5 MR. FRIEDMAN: Objection, form.</p> <p>10:33:31 6 THE WITNESS: That was irrelevant to me. I</p> <p>10:33:33 7 haven't done any independent analysis about what</p> <p>10:33:35 8 contract forms or business relationships would emerge</p> <p>10:33:39 9 between Amazon and individual publishers in the</p> <p>10:33:42 10 absence of the collusive agreement.</p> <p>10:33:43 11 <b>Q. MR. SWANSON: So you're not planning on</b></p> <p>10:33:45 12 <b>testifying that Random House would not have switched</b></p> <p>10:33:48 13 <b>to agency in early 2011 in the but-for world?</b></p> <p>10:33:51 14 A. What I'm testifying about is what the price</p> <p>10:33:55 15 effect was, not whether it was an agency model. It's</p> <p>10:33:58 16 whether the price was subject to collusion, and what</p> <p>10:34:03 17 form the retail price collusion took is irrelevant.</p> <p>10:34:07 18 What's relevant is the existence of collusion.</p> <p>10:34:09 19 <b>Q. In the but-for world, would Amazon have a</b></p> <p>10:34:12 20 <b>higher or lower share of the relevant market than it</b></p> <p>10:34:16 21 <b>did in reality?</b></p> <p>10:34:18 22 MR. FRIEDMAN: Objection, form.</p> <p>10:34:21 23 THE WITNESS: It's almost impossible to state</p> <p>10:34:32 24 because what Random House's share is going to be --</p> <p>10:34:36 25 <b>Q. MR. SWANSON: Amazon.</b></p> | <p style="text-align: right;">89</p> <p>10:35:36 1 <b>Q. In your disaggregation calculation or</b></p> <p>10:35:48 2 <b>calculations, you considered the retailers' overall</b></p> <p>10:35:54 3 <b>market share of publisher defendant titles sold under</b></p> <p>10:35:58 4 <b>the agency model. Is that a fair statement?</b></p> <p>10:36:00 5 A. Yes, it is the case I considered the identity</p> <p>10:36:04 6 of the retailer, yes, which would reflect their</p> <p>10:36:06 7 market share.</p> <p>10:36:08 8 <b>Q. And you have some assumptions about what that</b></p> <p>10:36:14 9 <b>market share would be in the but-for world or at</b></p> <p>10:36:17 10 <b>least you modeled?</b></p> <p>10:36:19 11 A. Well, the model is not about market share.</p> <p>10:36:24 12 It's not trying to predict market share. The model</p> <p>10:36:27 13 is about the role of the identity of the retailer in</p> <p>10:36:30 14 setting -- in pricing. So I allowed that to have an</p> <p>10:36:35 15 effect.</p> <p>10:36:35 16 <b>Q. Did the publisher defendants' market share of</b></p> <p>10:36:40 17 <b>titles sold under the agency model increase, decrease</b></p> <p>10:36:45 18 <b>or stay the same after the agency agreements were</b></p> <p>10:36:49 19 <b>implemented?</b></p> <p>10:36:50 20 A. I haven't analyzed that question. It would</p> <p>10:36:52 21 depend on things other than the implementation of the</p> <p>10:36:55 22 agency model, such as the hit rate of the publishers</p> <p>10:36:58 23 with regard to best sellers. So it's -- you know, I</p> <p>10:37:02 24 have not attempted to estimate the market shares of</p> <p>10:37:05 25 publishers either in or out of the collusive</p> |

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| <p style="text-align: right;">90</p> <p>10:37:08 1 agreement.</p> <p>10:37:09 2 <b>Q. Well, isn't it true that the share of sales</b></p> <p>10:37:14 3 <b>attributable to the publisher defendants' titles</b></p> <p>10:37:19 4 <b>dropped?</b></p> <p>10:37:19 5 A. I believe so, but it doesn't play any role in</p> <p>10:37:21 6 my analysis. I mean, that's the point is, you know,</p> <p>10:37:25 7 there's a fact out there about what's happening to</p> <p>10:37:27 8 market shares. But one would sort of expect, all</p> <p>10:37:30 9 else being equal, if somebody charges a higher price</p> <p>10:37:34 10 than their competitors they'd sell less. But there</p> <p>10:37:38 11 are so many other things going on that that -- in and</p> <p>10:37:41 12 of itself, that partial equilibrium statement is</p> <p>10:37:44 13 inadequate to make a forecast as to what's going to</p> <p>10:37:47 14 happen to the market shares.</p> <p>10:37:49 15 <b>Q. In the but-for world, would the publisher</b></p> <p>10:37:51 16 <b>defendants' market share have followed the same trend</b></p> <p>10:37:53 17 <b>as it did in the real world?</b></p> <p>10:37:55 18 MR. FRIEDMAN: Objection, form.</p> <p>10:37:56 19 THE WITNESS: May or may not. I don't know.</p> <p>10:37:58 20 I haven't done any analysis of that and you can't --</p> <p>10:38:01 21 there is no theoretical prediction that is robust.</p> <p>10:38:04 22 It's an empirical question, and I haven't analyzed</p> <p>10:38:07 23 it.</p> <p>10:38:08 24 <b>Q. MR. SWANSON: In the but-for world, would the</b></p> <p>10:38:14 25 <b>publishers defendants' market shares be proportioned</b></p> | <p style="text-align: right;">92</p> <p>10:39:18 1 <b>Q. MR. SWANSON: Do you believe that an</b></p> <p>10:39:19 2 <b>effective collusive agreement must not be undercut by</b></p> <p>10:39:23 3 <b>competitors who are not part of the agreement?</b></p> <p>10:39:25 4 MR. FRIEDMAN: Objection, form.</p> <p>10:39:26 5 THE WITNESS: Well, the effectiveness of a</p> <p>10:39:28 6 collusive agreement depends upon the extent of which</p> <p>10:39:30 7 those outside can undo it, can make it unprofitable,</p> <p>10:39:34 8 yes.</p> <p>10:39:34 9 <b>Q. MR. SWANSON: Is it true that for a collusive</b></p> <p>10:39:36 10 <b>agreement to work the parties to the agreement must</b></p> <p>10:39:39 11 <b>possess sufficient market power to be able to affect</b></p> <p>10:39:43 12 <b>total supply and, hence, prices?</b></p> <p>10:39:45 13 A. That's exactly what I said earlier. That's</p> <p>10:39:49 14 an empirical question again. They must be able to</p> <p>10:39:53 15 exercise more market power by acting collusively, and</p> <p>10:39:57 16 if the presumption is that in the absence of</p> <p>10:40:01 17 collusion the industry is competitive, then the</p> <p>10:40:06 18 elevation of price due to collusion is the elevation</p> <p>10:40:09 19 from a competitive benchmark to a market in which</p> <p>10:40:16 20 collectively the colluding entities can exercise</p> <p>10:40:19 21 market power despite the fact that the collusion does</p> <p>10:40:23 22 not include all sellers.</p> <p>10:40:25 23 <b>Q. Is a 50 percent market share sufficient to</b></p> <p>10:40:30 24 <b>give parties to a collusive agreement the market</b></p> <p>10:40:36 25 <b>power to affect market price?</b></p> |
| <p style="text-align: right;">91</p> <p>10:38:17 1 <b>the same vis-a-vis one another as in the actual post</b></p> <p>10:38:20 2 <b>agency world?</b></p> <p>10:38:21 3 MR. FRIEDMAN: Objection, form.</p> <p>10:38:21 4 THE WITNESS: Again, I have not analyzed that</p> <p>10:38:24 5 question, and it's irrelevant to what I did as long</p> <p>10:38:25 6 as the market is competitive.</p> <p>10:38:27 7 <b>Q. MR. SWANSON: And you make no assumption in</b></p> <p>10:38:29 8 <b>the structure of your model to that effect?</b></p> <p>10:38:31 9 A. There is no assumptions about what the market</p> <p>10:38:34 10 shares of any publisher are going to be at all. It's</p> <p>10:38:37 11 not part of the model, and it shouldn't be. It has</p> <p>10:38:41 12 no relevance to what I did.</p> <p>10:38:43 13 <b>Q. Market shares have no relevance to</b></p> <p>10:38:49 14 <b>calculating damages in an antitrust case?</b></p> <p>10:38:51 15 MR. FRIEDMAN: Objection, form.</p> <p>10:38:52 16 THE WITNESS: The only relevance of market</p> <p>10:38:53 17 shares is whether the collective market shares of the</p> <p>10:38:56 18 defendants are sufficient to be able collusively to</p> <p>10:38:59 19 elevate price, and that's what the model does is</p> <p>10:39:01 20 elevate -- is calculate as an empirical matter how</p> <p>10:39:05 21 much they were able to elevate their own price as a</p> <p>10:39:07 22 consequence of collusion. But besides that, it</p> <p>10:39:10 23 doesn't depend on what the composition of the market</p> <p>10:39:14 24 shares of the individual firms was inside the</p> <p>10:39:17 25 collusive agreement.</p>        | <p style="text-align: right;">93</p> <p>10:40:38 1 MR. FRIEDMAN: Objection, form.</p> <p>10:40:39 2 THE WITNESS: It depends on the nature of the</p> <p>10:40:41 3 industry that -- if you back out what the merger</p> <p>10:40:49 4 guidelines say about mergers, then that says you</p> <p>10:40:53 5 never would want to allow somebody to get to</p> <p>10:40:57 6 50 percent through merger. If you look at</p> <p>10:41:00 7 homogeneous product cases, they frequently find that</p> <p>10:41:04 8 market shares in the 50 to 60 percent range are</p> <p>10:41:07 9 insufficient to create power. So it depends on the</p> <p>10:41:10 10 fact of the case. That's why it's an empirical</p> <p>10:41:13 11 question whether a collusive agreement can work, not</p> <p>10:41:13 12 a theoretical question.</p> <p>10:41:15 13 <b>Q. How about a 25 percent market share? Is that</b></p> <p>10:41:17 14 <b>ever sufficient?</b></p> <p>10:41:18 15 A. It could be in a sufficiently product</p> <p>10:41:21 16 differentiated industry, yes. The issue then becomes</p> <p>10:41:25 17 who are the closest competitors to any given person.</p> <p>10:41:29 18 You think about hotdog stands at a beach. Two or</p> <p>10:41:33 19 three guys located next to each other, even though</p> <p>10:41:38 20 they're a small fraction of the market, might be able</p> <p>10:41:40 21 to effectuate a profit-enhancing collusive agreement.</p> <p>10:41:45 22 <b>Q. Do you have an understanding as to whether or</b></p> <p>10:41:47 23 <b>not Random House was a part of the conspiracy?</b></p> <p>10:41:51 24 A. My understanding is that they were not, but</p> <p>10:41:54 25 it's based solely on the opinion and I have no</p>     |

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| <p style="text-align: right;">94</p> <p>10:41:56 1 independent view of that. I've never analyzed it.</p> <p>10:41:59 2 <b>Q. What happened to the market share for sales</b></p> <p>10:42:03 3 <b>of Random House titles after the publisher defendants</b></p> <p>10:42:07 4 <b>entered into their agency agreements?</b></p> <p>10:42:08 5 MR. FRIEDMAN: Objection, form.</p> <p>10:42:09 6 THE WITNESS: I haven't done that</p> <p>10:42:11 7 calculation. It is not part of my report. Nothing</p> <p>10:42:15 8 in my report hinges on what happened to Random</p> <p>10:42:18 9 House's market share.</p> <p>10:42:19 10 <b>Q. MR. SWANSON: Is that true of Random House's</b></p> <p>10:42:21 11 <b>market share after it entered into an agency</b></p> <p>10:42:24 12 <b>agreement itself?</b></p> <p>10:42:24 13 A. Yes, I have seen such information in data,</p> <p>10:42:28 14 but it played no role in my report and nothing in my</p> <p>10:42:31 15 report hinges on that, on those facts.</p> <p>10:42:34 16 <b>Q. Are you assuming that the publisher</b></p> <p>10:42:39 17 <b>defendants' market power would be the same in the</b></p> <p>10:42:41 18 <b>but-for world as in the -- in the real world?</b></p> <p>10:42:45 19 MR. FRIEDMAN: Objection, form.</p> <p>10:42:47 20 THE WITNESS: I -- again, are you talking</p> <p>10:42:53 21 about collectively if they collude or individually?</p> <p>10:42:56 22 <b>Q. MR. SWANSON: Let's talk about individually</b></p> <p>10:42:57 23 <b>first.</b></p> <p>10:42:58 24 A. I'm assuming that the individual market power</p> <p>10:43:02 25 of the publishers is unaffected, that, first of all,</p>                                                    | <p style="text-align: right;">96</p> <p>10:44:38 1 <b>Q. And do you have any opinion, understanding,</b></p> <p>10:44:43 2 <b>insight as to whether or not Apple, if it had</b></p> <p>10:44:49 3 <b>operated an iBookstore in the but-for world, would</b></p> <p>10:44:54 4 <b>have been profitable at the prices that would prevail</b></p> <p>10:44:56 5 <b>under your model?</b></p> <p>10:44:57 6 MR. FRIEDMAN: Objection, form.</p> <p>10:44:58 7 THE WITNESS: I have undertaken no</p> <p>10:44:59 8 independent analysis of the profitability of the</p> <p>10:45:01 9 iBookstore under either the collusive arrangement or</p> <p>10:45:05 10 the competitive benchmark. I'm simply accepting the</p> <p>10:45:12 11 opinion of the Court that that issue is irrelevant</p> <p>10:45:14 12 and that no case has been made that that's a</p> <p>10:45:18 13 pro-competitive justification for the collusion.</p> <p>10:45:20 14 <b>Q. MR. SWANSON: So you're assuming that the</b></p> <p>10:45:23 15 <b>Court determined that Apple would be a retailer in</b></p> <p>10:45:27 16 <b>the but-for world?</b></p> <p>10:45:27 17 A. No, I said that the Court determined that</p> <p>10:45:30 18 that argument was not a pro-competitive -- produced</p> <p>10:45:37 19 no pro-competitive benefit, that the argument was not</p> <p>10:45:41 20 established and so it was rejected by the Court.</p> <p>10:45:44 21 <b>Q. You're aware from your data, are you not,</b></p> <p>10:45:51 22 <b>that Apple sold more than 33 million e-books during</b></p> <p>10:45:54 23 <b>the class period?</b></p> <p>10:45:55 24 A. I was not aware of the precise number, no.</p> <p>10:45:58 25 And thank you for telling me because I would never</p> |
| <p style="text-align: right;">95</p> <p>10:43:09 1 that they were competitive, so it's an imperfectly</p> <p>10:43:14 2 competitive or monopolistically competitive market.</p> <p>10:43:18 3 Obviously they don't sell homogeneous</p> <p>10:43:24 4 products and it's not perfectly competitive. Indeed,</p> <p>10:43:27 5 a publishing firm couldn't be perfectly competitive</p> <p>10:43:32 6 because of the nature of cost function. But I'm</p> <p>10:43:35 7 assuming there is a blanket competition in among the</p> <p>10:43:38 8 publishers.</p> <p>10:43:40 9 <b>Q. In the but-for world, would Amazon price</b></p> <p>10:43:47 10 <b>Kindle devices at cost, above cost or below cost on</b></p> <p>10:43:53 11 <b>average?</b></p> <p>10:43:53 12 MR. FRIEDMAN: Objection, form.</p> <p>10:43:54 13 THE WITNESS: That's not answerable on a</p> <p>10:43:56 14 theoretical basis. It's an empirical issue, and I</p> <p>10:44:01 15 haven't done an independent analysis to determine</p> <p>10:44:03 16 what the optimal pricing of Kindles would be.</p> <p>10:44:07 17 <b>Q. MR. SWANSON: Now, I'm going to make sure I</b></p> <p>10:44:12 18 <b>understand something that was touched upon in our</b></p> <p>10:44:14 19 <b>earlier discussion. Do you make any assumption about</b></p> <p>10:44:19 20 <b>whether or not the iBookstore would exist in the</b></p> <p>10:44:23 21 <b>but-for world as part of your work?</b></p> <p>10:44:24 22 A. There is actually -- the only implicit</p> <p>10:44:28 23 assumption in there is that the sales of the</p> <p>10:44:31 24 iBookstore would have happened somewhere, but whether</p> <p>10:44:35 25 they would happen there is not part of the model.</p> | <p style="text-align: right;">97</p> <p>10:46:01 1 have been able to remember.</p> <p>10:46:02 2 <b>Q. Well, you would have been able to find that</b></p> <p>10:46:04 3 <b>number out.</b></p> <p>10:46:04 4 A. I would find it out, but I -- you can ask me</p> <p>10:46:08 5 questions about how many e-books every single</p> <p>10:46:10 6 retailer sold, and I'm going to come up with exactly</p> <p>10:46:13 7 the same lack of precision in my knowledge. Not</p> <p>10:46:17 8 something I've committed to memory.</p> <p>10:46:20 9 <b>Q. I understand. What you were telling me a</b></p> <p>10:46:28 10 <b>moment ago was that your model assumes that those</b></p> <p>10:46:31 11 <b>approximately 33 million e-books would be sold in the</b></p> <p>10:46:34 12 <b>but-for world by someone.</b></p> <p>10:46:36 13 A. That's correct. I have -- the model is about</p> <p>10:46:39 14 how much damages -- you can identify damages</p> <p>10:46:43 15 associated with each retailer because the data do</p> <p>10:46:46 16 come from each retailer. But if the -- the argument</p> <p>10:46:51 17 that the iBookstore wouldn't exist, in my view, has</p> <p>10:46:55 18 already been rejected as an argument saying it's a</p> <p>10:46:59 19 pro-competitive benefit. So I don't have to worry</p> <p>10:47:01 20 about it. But implicit in the model is the notion</p> <p>10:47:05 21 that those would have been sold anyway.</p> <p>10:47:06 22 <b>Q. If it was determined that some of these 33</b></p> <p>10:47:12 23 <b>million e-book purchases would not have been made but</b></p> <p>10:47:15 24 <b>for the iBookstore, would that affect your model?</b></p> <p>10:47:18 25 MR. FRIEDMAN: Objection, form.</p>          |



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| <p style="text-align: right;">106</p> <p>11:11:48 1 say market. I have not examined entry of new</p> <p>11:11:51 2 publishers in any period. There is nothing in my</p> <p>11:11:55 3 report hinges on that. I haven't addressed the</p> <p>11:11:58 4 economics of entry into the publishing business.</p> <p>11:12:03 5 <b>Q. Is it your opinion that the same titles would</b></p> <p>11:12:05 6 <b>be released by independent publishers in the but-for</b></p> <p>11:12:08 7 <b>world as in the real world?</b></p> <p>11:12:09 8 A. The assumption in the model is that the</p> <p>11:12:15 9 titles that were offered would have been offered in</p> <p>11:12:17 10 any case.</p> <p>11:12:18 11 <b>Q. And is that true for titles offered by</b></p> <p>11:12:23 12 <b>self-publishers as well?</b></p> <p>11:12:25 13 A. It doesn't matter what they are. They're</p> <p>11:12:27 14 part -- they were released and they were released in</p> <p>11:12:32 15 a noncollusive environment. So the use of those</p> <p>11:12:36 16 prices is as part of the prices that are used to</p> <p>11:12:39 17 formulate the competitive benchmark.</p> <p>11:12:41 18 So the mechanics of how they enter into the</p> <p>11:12:46 19 damages model doesn't hinge on whether they would</p> <p>11:12:50 20 have entered anyway because if the world had been</p> <p>11:12:55 21 competitive, then there would be no anticompetitive</p> <p>11:12:58 22 effect on the prices of the colluding publishers. So</p> <p>11:13:02 23 they're just data points in this model about a</p> <p>11:13:05 24 competitive benchmark.</p> <p>11:13:06 25 <b>Q. You agree that the average prices for</b></p>  | <p style="text-align: right;">108</p> <p>11:14:35 1 were competitive.</p> <p>11:14:36 2 <b>Q. MR. SWANSON: In the but-for world, do you</b></p> <p>11:14:41 3 <b>assume that Amazon would have introduced the Kindle</b></p> <p>11:14:45 4 <b>app for the iPad?</b></p> <p>11:14:47 5 MR. FRIEDMAN: Objection, form.</p> <p>11:14:48 6 THE WITNESS: I make no assumptions about</p> <p>11:14:50 7 what anybody would have done with respect to the</p> <p>11:14:53 8 introduction of any hardware or any software. I'm</p> <p>11:14:57 9 just simply measuring the price effect in the world</p> <p>11:14:59 10 that actually happened.</p> <p>11:15:01 11 <b>Q. MR. SWANSON: Do you agree -- do you agree</b></p> <p>11:15:04 12 <b>that the iPad is a revolutionary device that has</b></p> <p>11:15:07 13 <b>encouraged innovation and competition?</b></p> <p>11:15:10 14 MR. FRIEDMAN: Objection, form.</p> <p>11:15:11 15 THE WITNESS: I have no independent analysis</p> <p>11:15:12 16 of the merits or demerits of an iPad that went into</p> <p>11:15:17 17 the construction of my expert report.</p> <p>11:15:20 18 <b>Q. MR. SWANSON: Well, did the Court make any</b></p> <p>11:15:22 19 <b>findings on that point?</b></p> <p>11:15:23 20 A. Yes, the Court did, but I say I have no</p> <p>11:15:26 21 independent opinion. Everything -- I'm just taking</p> <p>11:15:30 22 the Court's opinion as given for all of these issues.</p> <p>11:15:33 23 <b>Q. And on that issue as well?</b></p> <p>11:15:35 24 A. On every issue.</p> <p>11:15:36 25 <b>Q. Were the Kindle and the iPad competing</b></p>                                                      |
| <p style="text-align: right;">107</p> <p>11:13:09 1 <b>publishers who were not part of the conspiracy fell</b></p> <p>11:13:11 2 <b>after April 1st, 2010?</b></p> <p>11:13:13 3 MR. FRIEDMAN: Objection, form.</p> <p>11:13:15 4 THE WITNESS: What do you mean by average?</p> <p>11:13:17 5 It's true that the -- the average price without</p> <p>11:13:20 6 taking into effect composition effects fell. But I</p> <p>11:13:26 7 have seen nobody who actually constructed a price</p> <p>11:13:28 8 index, and I didn't.</p> <p>11:13:30 9 So the question would be yes, that's true, if</p> <p>11:13:36 10 you're talking about the unweighted average prices.</p> <p>11:13:42 11 If you're talking about a price index, I don't know</p> <p>11:13:44 12 whether it's true or not.</p> <p>11:13:45 13 <b>Q. MR. SWANSON: Are you assuming that all</b></p> <p>11:13:59 14 <b>e-book prices would have been the same in the but-for</b></p> <p>11:14:02 15 <b>world as in the real world for publishers outside the</b></p> <p>11:14:05 16 <b>big six?</b></p> <p>11:14:05 17 MR. FRIEDMAN: Objection, form.</p> <p>11:14:06 18 THE WITNESS: The presumption is that the</p> <p>11:14:13 19 competitive benchmark is in fact the prices that were</p> <p>11:14:17 20 charged by those entities, among others. If those</p> <p>11:14:20 21 prices during the collusive period were elevated due</p> <p>11:14:23 22 to the lack of less intense competition from the</p> <p>11:14:26 23 members of the conspiracy, then that is -- then those</p> <p>11:14:30 24 prices would have in fact been lower. So I have</p> <p>11:14:33 25 underestimated damages by the assumption that they</p> | <p style="text-align: right;">109</p> <p>11:15:42 1 <b>products?</b></p> <p>11:15:42 2 MR. FRIEDMAN: Objection, form.</p> <p>11:15:44 3 THE WITNESS: Again, I have not undertaken an</p> <p>11:15:47 4 analysis of the extent of competition in the market</p> <p>11:15:53 5 for tablet computers, but obviously I believe they</p> <p>11:15:56 6 were competing products, yes.</p> <p>11:15:58 7 <b>Q. MR. SWANSON: Do you think that the</b></p> <p>11:16:01 8 <b>introduction of the iPad had an effect on the quality</b></p> <p>11:16:05 9 <b>or features of other e-readers that were released</b></p> <p>11:16:08 10 <b>after the iPad?</b></p> <p>11:16:09 11 MR. FRIEDMAN: Objection, form.</p> <p>11:16:10 12 THE WITNESS: Again, I've done no independent</p> <p>11:16:12 13 analysis of the market for tablet computers, but</p> <p>11:16:15 14 obviously technological competition is one of the</p> <p>11:16:18 15 features of consumer electronics products, including</p> <p>11:16:22 16 tablet computers. So each firm's technological</p> <p>11:16:26 17 innovations lead to a response by other firms.</p> <p>11:16:29 18 <b>Q. MR. SWANSON: And did the introduction of the</b></p> <p>11:16:31 19 <b>iPad lead other firms making competing products to</b></p> <p>11:16:37 20 <b>change their prices for their devices?</b></p> <p>11:16:39 21 MR. FRIEDMAN: Objection, form.</p> <p>11:16:41 22 THE WITNESS: I have undertaken no</p> <p>11:16:43 23 independent analysis of how the introduction of the</p> <p>11:16:46 24 iPad affected the prices for other makers of</p> <p>11:16:50 25 e-readers or tablet computers, and it's irrelevant to</p> |

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| <p style="text-align: right;">146</p> <p>12:06:39 1 <b>Q. Is an unweighted version of the specification</b></p> <p>12:06:46 2 <b>one that would lead to unreliable results, in your</b></p> <p>12:06:51 3 <b>view?</b></p> <p>12:06:51 4 A. The -- yes. Well, let's put it -- put it</p> <p>12:06:54 5 somewhat differently. Nothing is perfect. All</p> <p>12:06:57 6 right? There's no perfect way to deal with the</p> <p>12:07:00 7 problem that we're dealing with.</p> <p>12:07:01 8 It would lead to -- if you examine what the</p> <p>12:07:05 9 errors are, what the prediction errors are inside the</p> <p>12:07:09 10 model, the prediction error -- if you do unweighted</p> <p>12:07:13 11 regression, the prediction errors will be smaller for</p> <p>12:07:16 12 the guys for which sales are very low, and they'll be</p> <p>12:07:19 13 larger for the titles for which sales are large.</p> <p>12:07:23 14 And so in terms of the effect on total</p> <p>12:07:26 15 revenues and total estimates of damages, when you're</p> <p>12:07:29 16 trading off precision for things that sell one versus</p> <p>12:07:33 17 precisions that sell a hundred thousand, it's more</p> <p>12:07:35 18 important to get the hundred thousand guy right, and</p> <p>12:07:38 19 that's the reason for doing weighted regressions.</p> <p>12:07:40 20 <b>Q. Are you familiar with the term statistical</b></p> <p>12:07:43 21 <b>significance?</b></p> <p>12:07:44 22 A. Yes.</p> <p>12:07:45 23 <b>Q. And -- it's just a foundation question.</b></p> <p>12:07:51 24 A. No, I never heard of it before.</p> <p>12:07:53 25 <b>Q. At least I didn't build it up word by word.</b></p>                            | <p style="text-align: right;">148</p> <p>12:09:38 1 <b>conduct is different from zero, correct?</b></p> <p>12:09:41 2 A. Yes, whether it's -- whether it is different</p> <p>12:09:45 3 from zero. The legal problem is that's a more likely</p> <p>12:09:50 4 than not question, not a statistical significance</p> <p>12:09:53 5 question. But that's why there is a -- there's a</p> <p>12:09:56 6 <b>problem here of using that terminology.</b></p> <p>12:09:58 7 <b>Q. And you understand that you are here not as a</b></p> <p>12:10:01 8 <b>juror facing the legal test of more likely than not,</b></p> <p>12:10:07 9 <b>but an expert who is supposed to lend expertise in</b></p> <p>12:10:11 10 <b>guidance of jurors, correct?</b></p> <p>12:10:13 11 A. Thank you for telling me what my role is,</p> <p>12:10:15 12 because I never would have guessed that I wasn't a</p> <p>12:10:18 13 juror.</p> <p>12:10:18 14 <b>Q. We might let on you the jury if you promise</b></p> <p>12:10:22 15 <b>to be fair.</b></p> <p>12:10:24 16 <b>How are we doing on time?</b></p> <p>12:10:27 17 VIDEOGRAPHER: We have about another five</p> <p>12:10:29 18 minutes.</p> <p>12:10:29 19 MR. SWANSON: Let's do it.</p> <p>12:10:30 20 <b>Q. If -- if you get very different results</b></p> <p>12:10:38 21 <b>whether you weight or not, doesn't it tell you</b></p> <p>12:10:42 22 <b>there's a specification problem with your model?</b></p> <p>12:10:44 23 MR. FRIEDMAN: Objection, form.</p> <p>12:10:45 24 THE WITNESS: No. That really isn't what</p> <p>12:10:50 25 it's about. There's always -- if you're -- if you're</p>                                                                                         |
| <p style="text-align: right;">147</p> <p>12:08:00 1 <b>And you mentioned prediction errors a moment</b></p> <p>12:08:05 2 <b>ago. What is the relationship between that concept</b></p> <p>12:08:08 3 <b>and the concept of statistical significance?</b></p> <p>12:08:11 4 A. Well, the statistical significance is a</p> <p>12:08:14 5 summary statistic about the average magnitude of the</p> <p>12:08:17 6 prediction errors.</p> <p>12:08:18 7 <b>Q. And are results that are statistically</b></p> <p>12:08:24 8 <b>significant more meaningful to you than results that</b></p> <p>12:08:27 9 <b>are not?</b></p> <p>12:08:28 10 A. It depends on what you mean. I mean, if</p> <p>12:08:34 11 you're using the appropriate concept of statistical</p> <p>12:08:38 12 significance, yes. But -- they are meaningful. But</p> <p>12:08:44 13 the standard statistical significance test is not --</p> <p>12:08:51 14 that's used in an academic paper isn't really</p> <p>12:08:56 15 mapped -- doesn't really map accurately into</p> <p>12:08:59 16 litigation concepts because the -- the issue there is</p> <p>12:09:05 17 not necessarily is something statistically</p> <p>12:09:08 18 significant different from zero, but does it add</p> <p>12:09:11 19 explanatory power compared to other variables in the</p> <p>12:09:16 20 equation by having this thing in there, which is a</p> <p>12:09:18 21 sort of different test.</p> <p>12:09:19 22 But in general we are concerned about</p> <p>12:09:21 23 statistical significance, yes.</p> <p>12:09:23 24 <b>Q. In offering opinions up about impact, you are</b></p> <p>12:09:36 25 <b>offering an opinion that the effect of the challenged</b></p> | <p style="text-align: right;">149</p> <p>12:10:54 1 not explaining all of the data, there's a</p> <p>12:10:56 2 specification error unless the world is truly random.</p> <p>12:11:00 3 All right? So, of course, there's a specification</p> <p>12:11:02 4 error. There's always a specification error in every</p> <p>12:11:07 5 model, but that's not why results -- that's not</p> <p>12:11:11 6 only -- that doesn't lead to the conclusion that</p> <p>12:11:14 7 quantity weighting would get a big or a little</p> <p>12:11:16 8 difference, right?</p> <p>12:11:17 9 The quantity weighting is what I told you</p> <p>12:11:19 10 about. It's about in a data set which has a very</p> <p>12:11:22 11 large number of observations that don't matter very</p> <p>12:11:25 12 much in terms of what the object of the game is which</p> <p>12:11:28 13 is to estimate damages. Quantity weighting says</p> <p>12:11:30 14 we're going to make certain that the resolution of</p> <p>12:11:34 15 the precision of estimates is -- goes in the favor of</p> <p>12:11:38 16 the ones that matter as opposed to ones that don't</p> <p>12:11:40 17 matter. That's all that it's about.</p> <p>12:11:43 18 Of course, if you had perfectly specified the</p> <p>12:11:46 19 model and had an R squared of 1.0, then it wouldn't</p> <p>12:11:50 20 matter what the quantity weight was; but it does</p> <p>12:11:54 21 matter as long as the model is imperfect. It's</p> <p>12:11:57 22 extremely likely to matter if the model is not</p> <p>12:12:00 23 perfect.</p> <p>12:12:01 24 <b>Q. MR. SWANSON: Speaking of R squared, earlier</b></p> <p>12:12:06 25 <b>we had talked about adjusted R squared and within R</b></p> |



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| <p style="text-align: right;">150</p> <p>12:12:10 1 <b>squared.</b></p> <p>12:12:11 2 A. Right.</p> <p>12:12:11 3 <b>Q. Can you tell me what the difference is</b></p> <p>12:12:15 4 <b>between the two of those, adjusted R squared and</b></p> <p>12:12:18 5 <b>within R squared?</b></p> <p>12:12:19 6 A. I don't -- in this model I don't know. I</p> <p>12:12:22 7 don't remember.</p> <p>12:12:22 8 <b>Q. Was there a reason why you chose to report</b></p> <p>12:12:25 9 <b>adjusted R squared as opposed to within R squared?</b></p> <p>12:12:29 10 A. I -- no, not specific to this case, no. I</p> <p>12:12:36 11 just -- I just tend to report adjusted R squared</p> <p>12:12:39 12 because, you know -- but I didn't think carefully</p> <p>12:12:42 13 about which one to report.</p> <p>12:12:44 14 <b>Q. You would have no objection to disclosing</b></p> <p>12:12:49 15 <b>to the Court or to the jury what your within R</b></p> <p>12:12:52 16 <b>squared --</b></p> <p>12:12:52 17 <b>MR. FRIEDMAN: No.</b></p> <p>12:12:55 18 <b>Q. MR. SWANSON: -- result is.</b></p> <p>12:12:56 19 <b>MR. FRIEDMAN: No. I'm going to instruct him</b></p> <p>12:12:57 20 <b>not to answer that that question. It's not a proper</b></p> <p>12:13:01 21 <b>question. Instruct you not to answer.</b></p> <p>12:13:03 22 <b>MR. SWANSON: It's in his results. Are you</b></p> <p>12:13:04 23 <b>serious? On what basis?</b></p> <p>12:13:06 24 <b>MR. FRIEDMAN: Well, an objection as to</b></p> <p>12:13:09 25 <b>disclosing what's in his result?</b></p>             | <p style="text-align: right;">152</p> <p>12:59:57 1 VIDEOGRAPHER: This now marks the beginning</p> <p>13:00:11 2 of tape labeled number three of the videotaped</p> <p>13:00:15 3 deposition of Roger Noll. We're now going back on</p> <p>13:00:17 4 the record. The time is 12:59.</p> <p>13:00:19 5 <b>Q. MR. SWANSON: All right. Professor Noll, the</b></p> <p>13:00:22 6 <b>term market concentration is one that economists use,</b></p> <p>13:00:25 7 <b>correct?</b></p> <p>13:00:26 8 A. Yes, although I think these days lawyers use</p> <p>13:00:33 9 it more than economists.</p> <p>13:00:34 10 <b>Q. Entirely possible. What is the relationship</b></p> <p>13:00:37 11 <b>between market concentration and market share?</b></p> <p>13:00:39 12 <b>MR. FRIEDMAN: Objection, form.</b></p> <p>13:00:41 13 <b>THE WITNESS: The degree of concentration in</b></p> <p>13:00:48 14 <b>the market is the sum of the market shares of the</b></p> <p>13:00:54 15 <b>firms in the market.</b></p> <p>13:00:55 16 <b>Q. MR. SWANSON: Are you familiar with the</b></p> <p>13:00:56 17 <b>strata -- I'm sorry. Strike that.</b></p> <p>13:01:01 18 <b>Are you familiar with the Stata command XT</b></p> <p>13:01:05 19 <b>reg also, I gather, known as XT regress?</b></p> <p>13:01:10 20 A. Well, it's just a regression. What --</p> <p>13:01:15 21 <b>Q. Do you know what it does?</b></p> <p>13:01:17 22 A. You run a regression. I mean, I...</p> <p>13:01:20 23 <b>Q. And are you familiar with the Stata command A</b></p> <p>13:01:24 24 <b>reg or A regress?</b></p> <p>13:01:28 25 A. I'm not -- I am not going to define precisely</p> |
| <p style="text-align: right;">151</p> <p>12:13:12 1 <b>MR. SWANSON: Yes.</b></p> <p>12:13:12 2 <b>MR. FRIEDMAN: We don't have an objection to</b></p> <p>12:13:13 3 <b>that. That's in his result that you have?</b></p> <p>12:13:16 4 <b>MR. SWANSON: Yeah, it's not a secret.</b></p> <p>12:13:18 5 <b>MR. FRIEDMAN: All right. Then I have no</b></p> <p>12:13:19 6 <b>understanding of why you asked that question, but go</b></p> <p>12:13:21 7 <b>ahead.</b></p> <p>12:13:22 8 <b>Q. MR. SWANSON: You're the -- the result that</b></p> <p>12:13:25 9 <b>you've disclosed in your report written in your</b></p> <p>12:13:27 10 <b>narrative report is an adjusted R squared of</b></p> <p>12:13:31 11 <b>90 percent, correct?</b></p> <p>12:13:32 12 A. Right.</p> <p>12:13:32 13 <b>Q. Isn't it a fact that the within R squared is</b></p> <p>12:13:36 14 <b>12 percent?</b></p> <p>12:13:36 15 A. I don't remember what it is. I mean, those</p> <p>12:13:44 16 numbers are for different purposes. All right? And</p> <p>12:13:47 17 I don't remember what the within is. It's not one</p> <p>12:13:49 18 that I would have used.</p> <p>12:13:53 19 <b>MR. SWANSON: Why don't we take our break</b></p> <p>12:13:55 20 <b>now.</b></p> <p>12:13:56 21 <b>VIDEOGRAPHER: This now the marks the end of</b></p> <p>12:13:58 22 <b>tape labeled number two, the videotaped deposition of</b></p> <p>12:14:01 23 <b>Roger Noll. We're now going off the record. The</b></p> <p>12:14:04 24 <b>time is 12:13.</b></p> <p>12:14:05 25 <b>(Deposition recess taken.)</b></p> | <p style="text-align: right;">153</p> <p>13:01:31 1 what that command means because I don't remember.</p> <p>13:01:33 2 <b>Q. If I asked you what the difference between XT</b></p> <p>13:01:35 3 <b>reg and A reg is --</b></p> <p>13:01:37 4 A. I don't remember.</p> <p>13:01:38 5 <b>Q. You are aware that you use both in your</b></p> <p>13:01:40 6 <b>backup work.</b></p> <p>13:01:42 7 A. The program was not written by me when it was</p> <p>13:01:45 8 written for Stata, and I did not write the program.</p> <p>13:01:50 9 And so I'm not the one who has to be writing down the</p> <p>13:01:56 10 commands to the computer using Stata.</p> <p>13:01:59 11 <b>Q. You had someone else confirm that that was</b></p> <p>13:02:01 12 <b>done accurately?</b></p> <p>13:02:02 13 A. Yes.</p> <p>13:02:03 14 <b>Q. We've spoken before about within R squared.</b></p> <p>13:02:08 15 A. Right.</p> <p>13:02:09 16 <b>Q. Can you tell me what that is as a statistical</b></p> <p>13:02:12 17 <b>measure in general terms?</b></p> <p>13:02:16 18 A. It's -- the difference between the R squared</p> <p>13:02:21 19 and adjusted R squared for the regression and the</p> <p>13:02:24 20 within thing is as follows. The R squared, an</p> <p>13:02:28 21 adjusted R squared for the regression talks about the</p> <p>13:02:32 22 ability to explain the variations in the variable you</p> <p>13:02:34 23 actually used, but that variable is then used to</p> <p>13:02:37 24 produce -- predict individual transactions prices.</p> <p>13:02:41 25 So that creates a second source of variation, which</p>                                |

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| <p style="text-align: right;">154</p> <p>13:02:44 1 is the variation of the -- of the individual</p> <p>13:02:46 2 transactions for prices around the predicted price.</p> <p>13:02:50 3 And the within is measuring the latter, not the</p> <p>13:02:53 4 former.</p> <p>13:02:53 5 <b>Q. Is the within measuring the extent to which</b></p> <p>13:02:58 6 <b>you're accounting for the variation in individual</b></p> <p>13:03:00 7 <b>title prices over time?</b></p> <p>13:03:03 8 A. Well, it's about the extent to which</p> <p>13:03:08 9 predicting an average in a category predicts the</p> <p>13:03:13 10 individual observations in a category.</p> <p>13:03:16 11 <b>Q. Let me ask you to turn to page 19 of your</b></p> <p>13:03:23 12 <b>report, Exhibit 1. And let me find it. Oh, I'm</b></p> <p>13:03:38 13 <b>starting from the first sentence of the bottom</b></p> <p>13:03:41 14 <b>paragraph where you say: "To make analysis of these</b></p> <p>13:03:46 15 <b>data more tractable, the weekly data were aggregated</b></p> <p>13:03:49 16 <b>into four-week periods for use in econometric</b></p> <p>13:03:54 17 <b>estimation."</b></p> <p>13:03:55 18 <b>See that? What was intractable about using</b></p> <p>13:03:57 19 <b>nonaggregated data?</b></p> <p>13:03:57 20 A. The amount of computer power and time</p> <p>13:04:00 21 required to run a regression. That the more</p> <p>13:04:04 22 observations you have to run the regression on, the</p> <p>13:04:07 23 more computer power it takes. And you would have to</p> <p>13:04:10 24 have -- well, there's two aspects to the problem.</p> <p>13:04:19 25 The first is the regression -- the underlying</p>                                                      | <p style="text-align: right;">156</p> <p>13:05:42 1 horizon I had --</p> <p>13:05:44 2 MR. HUBBARD: Four-week.</p> <p>13:05:45 3 THE WITNESS: Excuse me. Four-week. Yes, it</p> <p>13:05:47 4 wasn't four months. The aggregation to four weeks</p> <p>13:05:49 5 had already been done. So that meant that I didn't</p> <p>13:05:52 6 have to construct some other aggregation mechanism</p> <p>13:05:54 7 within the time frame I had.</p> <p>13:05:56 8 <b>Q. MR. SWANSON: Did you examine individual</b></p> <p>13:06:01 9 <b>transaction prices at any point?</b></p> <p>13:06:04 10 A. Well, the damage calculation is the actual</p> <p>13:06:10 11 price minus the predicted price. So in that sense,</p> <p>13:06:16 12 yes.</p> <p>13:06:17 13 <b>Q. The -- the actual price --</b></p> <p>13:06:20 14 A. I guess I don't understand the question.</p> <p>13:06:22 15 Maybe I missed the question. What are you -- what</p> <p>13:06:24 16 are you asking me?</p> <p>13:06:25 17 <b>Q. I was asking is there any statistical work</b></p> <p>13:06:28 18 <b>you've done on -- on --</b></p> <p>13:06:31 19 A. Oh, okay.</p> <p>13:06:31 20 <b>Q. -- individual -- individualized transaction</b></p> <p>13:06:34 21 <b>data.</b></p> <p>13:06:35 22 A. No, I have not analyzed the individual</p> <p>13:06:37 23 transactions data. Actually, that's not quite true.</p> <p>13:06:47 24 Remember, the -- the method for allocating the</p> <p>13:06:51 25 damages among states is based upon assigning</p>                                                                                                                                                      |
| <p style="text-align: right;">155</p> <p>13:04:22 1 data, you have to pay attention at the level of</p> <p>13:04:26 2 individual observations to errors to a much greater</p> <p>13:04:29 3 extent. If a very tiny fraction of the observations</p> <p>13:04:33 4 are wrong, you want to clean the data of those before</p> <p>13:04:36 5 you would do any individual level regression, even if</p> <p>13:04:40 6 they're a small fraction, because outliers can have a</p> <p>13:04:43 7 huge effect on a regression model.</p> <p>13:04:46 8 You are much less concerned about a small</p> <p>13:04:48 9 number of outliers if you are using averages. So you</p> <p>13:04:52 10 don't have to devote the same amount of time to</p> <p>13:04:54 11 cleaning the data, which can take literally months</p> <p>13:04:57 12 for a large data set.</p> <p>13:04:59 13 And then the second -- the second issue has</p> <p>13:05:01 14 to do with the amount of computer power it takes to</p> <p>13:05:05 15 estimate the regression coefficients when you have</p> <p>13:05:07 16 billions of observations as contrasted to thousands</p> <p>13:05:11 17 or hundreds of thousands or something like that. To</p> <p>13:05:13 18 do a regression on a huge data set can take linking</p> <p>13:05:18 19 together multiple computers and then running it for</p> <p>13:05:21 20 two days to get a single regression result.</p> <p>13:05:25 21 <b>Q. And did you give consideration to using other</b></p> <p>13:05:29 22 <b>periods of time for your aggregation or averaging of</b></p> <p>13:05:33 23 <b>the price data?</b></p> <p>13:05:34 24 A. Well, consideration, yes. But the</p> <p>13:05:39 25 four-month stuff was already done. So in the time</p> | <p style="text-align: right;">157</p> <p>13:06:53 1 individual transactions to a state. So, yes, we've</p> <p>13:06:58 2 done that, but we haven't run regressions on</p> <p>13:07:01 3 individual transactions data.</p> <p>13:07:02 4 <b>Q. Are the only important characteristics for</b></p> <p>13:07:08 5 <b>pricing an e-book title for any given publisher the</b></p> <p>13:07:13 6 <b>ones for which you've introduced variables into your</b></p> <p>13:07:18 7 <b>model?</b></p> <p>13:07:19 8 A. In principle, I could imagine there could be</p> <p>13:07:22 9 other characteristics. In practice, I don't what I</p> <p>13:07:25 10 would use that I haven't used.</p> <p>13:07:33 11 <b>Q. Would you agree that the transaction data</b></p> <p>13:07:35 12 <b>upon which your model relies includes more genres</b></p> <p>13:07:39 13 <b>than the categories you use?</b></p> <p>13:07:41 14 A. Yes, remember, we aggregated some into</p> <p>13:07:45 15 puddles. There's the other genre puddle and there's</p> <p>13:07:48 16 the we don't know what it is puddle.</p> <p>13:07:50 17 <b>Q. The Amazon data contained genres such as</b></p> <p>13:07:54 18 <b>romance, mystery and thriller, science fiction and</b></p> <p>13:07:58 19 <b>fantasy, literature and fiction and sports, correct?</b></p> <p>13:08:03 20 A. That's correct.</p> <p>13:08:04 21 <b>Q. Did you use those genres as separate</b></p> <p>13:08:07 22 <b>categories in your model?</b></p> <p>13:08:08 23 A. No.</p> <p>13:08:09 24 <b>Q. Have you aggregated -- well, I think you've</b></p> <p>13:08:17 25 <b>said you've aggregated some different genres into a</b></p> |

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| <p>158</p> <p>13:08:22 1 single category or several different categories. Is</p> <p>13:08:23 2 that -- is that a proper interpretation?</p> <p>13:08:24 3 A. I'm not sure I understand the question.</p> <p>13:08:26 4 Q. Okay.</p> <p>13:08:26 5 A. If it's not -- if the answer isn't apparent</p> <p>13:08:29 6 from the list of the variables, then I don't</p> <p>13:08:31 7 understand the question.</p> <p>13:08:32 8 <b>Q. Well, for example, do you aggregate romance,</b></p> <p>13:08:36 9 <b>mystery and science fiction into a broad science</b></p> <p>13:08:40 10 <b>fiction category?</b></p> <p>13:08:41 11 A. It would be aggregated into the other</p> <p>13:08:44 12 category, yes.</p> <p>13:08:44 13 <b>Q. That would be other and not fiction?</b></p> <p>13:08:47 14 A. Well, if it's something that can appear on</p> <p>13:08:50 15 the fiction best seller list, it's in that category.</p> <p>13:08:54 16 If it's not something that can appear in the fiction</p> <p>13:08:57 17 best seller category, it would be in the other.</p> <p>13:08:59 18 <b>Q. So that was the basis on which you did that</b></p> <p>13:09:02 19 <b>aggregation?</b></p> <p>13:09:03 20 A. Well, the -- yeah, notice that all the</p> <p>13:09:07 21 categories we have other than children's are</p> <p>13:09:09 22 associated with the New York Times best seller list.</p> <p>13:09:13 23 <b>Q. Is it your testimony that the price of two</b></p> <p>13:09:19 24 <b>e-books in the same category and produced by the same</b></p> <p>13:09:23 25 <b>publisher were impacted in the same manner by the</b></p>                                                                  | <p>160</p> <p>13:10:39 1 <b>Q. Do you agree that the standard approach to</b></p> <p>13:10:44 2 <b>proving that collusion raised prices is to construct</b></p> <p>13:10:48 3 <b>an econometric model of product pricing and taking</b></p> <p>13:10:54 4 <b>into account all of the other factors that affect</b></p> <p>13:10:57 5 <b>price including costs, market concentration and</b></p> <p>13:10:59 6 <b>market demand, prices were higher due to collusion?</b></p> <p>13:11:02 7 MR. FRIEDMAN: Objection, form.</p> <p>13:11:03 8 THE WITNESS: Those are the things taken into</p> <p>13:11:06 9 account, yes.</p> <p>13:11:06 10 <b>Q. MR. SWANSON: Does your regression model take</b></p> <p>13:11:09 11 <b>account of costs?</b></p> <p>13:11:10 12 A. Well, the cost that we're interested in is</p> <p>13:11:14 13 the cost to the retailer, right? Because we're</p> <p>13:11:17 14 interested in retail prices. And these, as you know,</p> <p>13:11:23 15 the categories depend on hard cover prices which are</p> <p>13:11:26 16 related to the cost to the retailer.</p> <p>13:11:31 17 So they're indirectly taken into account, but</p> <p>13:11:34 18 what they -- what they actually paid for them is not</p> <p>13:11:38 19 actually a variable in the model.</p> <p>13:11:40 20 <b>Q. Does your regression model take account of</b></p> <p>13:11:43 21 <b>market concentration?</b></p> <p>13:11:44 22 A. It does not take into account market</p> <p>13:11:48 23 concentration except insofar as that's taken into</p> <p>13:11:50 24 account for the indicator variables for the specific</p> <p>13:11:54 25 firms because the market concentration would -- the</p> |
| <p>159</p> <p>13:09:26 1 <b>change from a wholesale business model to an agency</b></p> <p>13:09:29 2 <b>business model?</b></p> <p>13:09:30 3 MR. FRIEDMAN: Objection, form.</p> <p>13:09:31 4 THE WITNESS: Well, they would have to be.</p> <p>13:09:33 5 Two titles have the same impact if the values of all</p> <p>13:09:37 6 the independent variables were identically the same</p> <p>13:09:39 7 for both of them.</p> <p>13:09:40 8 <b>Q. MR. SWANSON: So if they were in the same</b></p> <p>13:09:45 9 <b>category and they were published by the same</b></p> <p>13:09:50 10 <b>publisher, what other variables --</b></p> <p>13:09:52 11 A. Sold by the same retailer, status with regard</p> <p>13:09:55 12 to the New York Times best seller list, observation</p> <p>13:09:58 13 at the same point in time. All those phenomena would</p> <p>13:10:03 14 have to be the same. Every single variable that's in</p> <p>13:10:06 15 the regression would have to take the same value for</p> <p>13:10:09 16 the two titles.</p> <p>13:10:10 17 <b>Q. And to the extent that all those variables</b></p> <p>13:10:12 18 <b>did take the same value, then two books would have</b></p> <p>13:10:15 19 <b>the same impact, according to your model from the --</b></p> <p>13:10:20 20 <b>from the conduct at issue in the case?</b></p> <p>13:10:22 21 A. Yes, the R squared of .9 is not 1.0 because</p> <p>13:10:27 22 there's going to be something out there that isn't in</p> <p>13:10:31 23 the regression that might have explained that.</p> <p>13:10:33 24 That's the unexplained variance. I don't know what</p> <p>13:10:35 25 it is, but that would be something.</p> | <p>161</p> <p>13:11:57 1 coefficient for Amazon.com, to the extent it differed</p> <p>13:12:01 2 from the coefficient for somebody else, would take</p> <p>13:12:04 3 account of all the attributes of Amazon, including</p> <p>13:12:07 4 market concentration differences.</p> <p>13:12:09 5 <b>Q. Do economists believe that changes in the</b></p> <p>13:12:12 6 <b>wholesale prices are relevant to the level of retail</b></p> <p>13:12:14 7 <b>prices for the same product?</b></p> <p>13:12:15 8 A. Of course.</p> <p>13:12:16 9 <b>Q. Are you aware that the defendant publishers</b></p> <p>13:12:21 10 <b>had changed wholesale e-book pricing in the preagency</b></p> <p>13:12:25 11 <b>period?</b></p> <p>13:12:25 12 MR. FRIEDMAN: Objection, form.</p> <p>13:12:28 13 THE WITNESS: I'm not sure to what you're</p> <p>13:12:30 14 referring. I mean, prices change, yes, but I don't</p> <p>13:12:34 15 know what you're referring to in the question.</p> <p>13:12:36 16 <b>Q. MR. SWANSON: Are you aware of generally how</b></p> <p>13:12:40 17 <b>the defendant publishers priced e-books at wholesale</b></p> <p>13:12:46 18 <b>under the wholesale model?</b></p> <p>13:12:47 19 MR. FRIEDMAN: Objection, form.</p> <p>13:12:49 20 THE WITNESS: I recall having seen that</p> <p>13:12:50 21 information, but it played no role in how I modeled</p> <p>13:12:53 22 the damages.</p> <p>13:12:55 23 <b>Q. MR. SWANSON: In the but-for world, would</b></p> <p>13:12:59 24 <b>wholesale prices for e-books be different than in the</b></p> <p>13:13:01 25 <b>actual world?</b></p>                                                                                           |

| 162      |    |                                                              | 164      |    |                                                              |
|----------|----|--------------------------------------------------------------|----------|----|--------------------------------------------------------------|
| 13:13:02 | 1  | MR. FRIEDMAN: Objection, form.                               | 13:16:00 | 1  | the level of individual coefficients. I mean, first          |
| 13:13:03 | 2  | THE WITNESS: You asked me that this morning,                 | 13:16:04 | 2  | of all, it's not clear what's the appropriate test           |
| 13:13:05 | 3  | and one of the features of the agency model was that         | 13:16:09 | 3  | for statistical significance. All right? And,                |
| 13:13:08 | 4  | some prices were reduced at the wholesale level.             | 13:16:12 | 4  | secondly, the goal is to explain as much of the data         |
| 13:13:12 | 5  | <b>Q. MR. SWANSON: And you would not expect to see</b>       | 13:16:15 | 5  | as possible without including the effect of the              |
| 13:13:15 | 6  | <b>that in the but-for world?</b>                            | 13:16:19 | 6  | collusive agreement.                                         |
| 13:13:16 | 7  | A. That's correct.                                           | 13:16:19 | 7  | So it's more like how you would do the first                 |
| 13:13:17 | 8  | <b>Q. Focusing on a single transaction for a single</b>      | 13:16:24 | 8  | stage of a two-stage least squares model. You want           |
| 13:13:33 | 9  | <b>title at a given point in time, how do you identify</b>   | 13:16:28 | 9  | to do the best job you can of forecasting the                |
| 13:13:38 | 10 | <b>the overcharge associated with that single</b>            | 13:16:31 | 10 | dependent variable with the data you have, and there         |
| 13:13:42 | 11 | <b>transaction for that single title?</b>                    | 13:16:34 | 11 | you don't evaluate things on the basis of their              |
| 13:13:43 | 12 | A. That's the difference between the price that              | 13:16:40 | 12 | statistical significance of a coefficient. You               |
| 13:13:47 | 13 | was charged for that title in that period versus the         | 13:16:43 | 13 | evaluate instead the quality of the regression on the        |
| 13:13:52 | 14 | competitive benchmark price.                                 | 13:16:47 | 14 | basis of the difference by adding the collusion              |
| 13:13:54 | 15 | <b>Q. And the actual price that's charged is in</b>          | 13:16:52 | 15 | indicator.                                                   |
| 13:14:03 | 16 | <b>your data?</b>                                            | 13:16:54 | 16 | <b>Q. Well, it's fact, isn't it, that a number of</b>        |
| 13:14:04 | 17 | A. Well, the transactions records are actual                 | 13:16:59 | 17 | <b>your overcharge coefficients are not statistically</b>    |
| 13:14:09 | 18 | prices. The data constructs the averages for each            | 13:17:03 | 18 | <b>significant?</b>                                          |
| 13:14:14 | 19 | four-week period for each title.                             | 13:17:03 | 19 | A. I haven't -- I didn't look at that because                |
| 13:14:16 | 20 | <b>Q. Is it fair to say that in your regression</b>          | 13:17:05 | 20 | that's not the point of a forecasting model. The             |
| 13:14:27 | 21 | <b>model you compute 12 overcharge coefficients for each</b> | 13:17:09 | 21 | point of a forecasting model is do the best job of           |
| 13:14:33 | 22 | <b>publisher corresponding with the 12 categories we</b>     | 13:17:13 | 22 | explaining the noncollusive prices and then add to           |
| 13:14:37 | 23 | <b>covered earlier today?</b>                                | 13:17:17 | 23 | that the effect of collusion. And there's all kinds          |
| 13:14:38 | 24 | A. There are more than those variables in the                | 13:17:19 | 24 | of reasons why you might get specific variables being        |
| 13:14:42 | 25 | model. I guess I don't understand the question. All          | 13:17:22 | 25 | statistically insignificant but you still would want         |
| 163      |    |                                                              | 165      |    |                                                              |
| 13:14:45 | 1  | the variables affect the estimated price for every           | 13:17:26 | 1  | them in the equation because of possible interaction         |
| 13:14:48 | 2  | publisher. So I guess I don't understand the                 | 13:17:28 | 2  | with the effect you're measuring.                            |
| 13:14:50 | 3  | question.                                                    | 13:17:29 | 3  | So the question is premised on an incorrect                  |
| 13:14:50 | 4  | <b>Q. Well, you compute overcharge coefficients</b>          | 13:17:32 | 4  | conceptualization of what the forecasting model is           |
| 13:14:54 | 5  | <b>that for each publisher that are associated with each</b> | 13:17:36 | 5  | supposed to do and how you construct it.                     |
| 13:14:57 | 6  | <b>of those 12 categories that we --</b>                     | 13:17:38 | 6  | <b>Q. Well, if one of your coefficients is not</b>           |
| 13:15:01 | 7  | A. Yes.                                                      | 13:17:44 | 7  | <b>statistically significant, can you reject the</b>         |
| 13:15:01 | 8  | <b>Q. -- spoke of earlier, correct?</b>                      | 13:17:48 | 8  | <b>hypothesis as an academic economist that purchasers</b>   |
| 13:15:03 | 9  | A. Yes, but other variables are still affecting              | 13:17:49 | 9  | <b>of e-books in that category were not injured?</b>         |
| 13:15:07 | 10 | the price. It's not that those other variables               | 13:17:54 | 10 | A. No, because -- not unless the coefficient is              |
| 13:15:09 | 11 | disappear in some sense.                                     | 13:17:58 | 11 | not statistically significant. If it -- the only way         |
| 13:15:11 | 12 | <b>Q. Did you compute a set of overcharge</b>                | 13:18:01 | 12 | you could do that is if the effect of the collusion          |
| 13:15:14 | 13 | <b>coefficients for Random House?</b>                        | 13:18:04 | 13 | period itself were statistically insignificant. And          |
| 13:15:17 | 14 | A. Well, somebody's excluded from the data. So               | 13:18:06 | 14 | since that interacts with a whole bunch of things,           |
| 13:15:24 | 15 | I don't remember precisely which one is. But in any          | 13:18:06 | 15 | you can't do it on the basis of each individual              |
| 13:15:28 | 16 | case, one could do that calculation with it, yes.            | 13:18:08 | 16 | coefficient.                                                 |
| 13:15:31 | 17 | You could estimate the departure of the competitive          | 13:18:09 | 17 | That's the whole point of a forecasting                      |
| 13:15:36 | 18 | price from the competitive benchmark price for Random        | 13:18:11 | 18 | model. You evaluate on the basis of the equation,            |
| 13:15:41 | 19 | House in the data. Yes, you could do that.                   | 13:18:14 | 19 | not on the basis of a coefficient.                           |
| 13:15:44 | 20 | <b>Q. But that's not something you've done?</b>              | 13:18:16 | 20 | <b>Q. So you would have concerns about statistical</b>       |
| 13:15:46 | 21 | A. No.                                                       | 13:18:20 | 21 | <b>significance only if all of the coefficients were not</b> |
| 13:15:46 | 22 | <b>Q. Did you evaluate whether all of your</b>               | 13:18:24 | 22 | <b>statistically significant?</b>                            |
| 13:15:50 | 23 | <b>overcharge coefficients were statistically</b>            | 13:18:25 | 23 | A. No, you could have that for multiple                      |
| 13:15:54 | 24 | <b>significant?</b>                                          | 13:18:30 | 24 | collinearity among the data. The question is is the          |
| 13:15:54 | 25 | A. I don't think that's the relevant question at             | 13:18:33 | 25 | equation explaining variance in the object of                |

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| <p style="text-align: right;">166</p> <p>13:18:36 1 interest, which is the dependent variable.</p> <p>13:18:38 2 So am I explaining the variations in prices</p> <p>13:18:43 3 at the competitive benchmark versus not is what the</p> <p>13:18:46 4 question is. So you're interested in the -- in the</p> <p>13:18:50 5 value of the indicator for the collusive period added</p> <p>13:18:55 6 to the equation.</p> <p>13:18:56 7 Now, if the equation weren't explaining</p> <p>13:18:59 8 anything, then there would be no estimated damages</p> <p>13:19:04 9 because everything would be pulling zero weight in</p> <p>13:19:09 10 explaining differences. So you'd get a zero effect.</p> <p>13:19:12 11 The object of the game is explain the data as</p> <p>13:19:16 12 well as you can without the collusion variable, then</p> <p>13:19:20 13 add the collusion variable and see if that adds to</p> <p>13:19:22 14 the significance of the question.</p> <p>13:19:26 15 <b>Q. So is it your testimony that statistically</b></p> <p>13:19:30 16 <b>there is no way to assess whether or not a particular</b></p> <p>13:19:35 17 <b>coefficient of the sort that you've reported in</b></p> <p>13:19:38 18 <b>Exhibit 1 for a particular publisher for a particular</b></p> <p>13:19:41 19 <b>category is econometrically reliable?</b></p> <p>13:19:49 20 A. You could -- if there were a hypothesis you</p> <p>13:19:57 21 wanted to test for which that was the question, then</p> <p>13:19:59 22 you could use -- then you could answer it using</p> <p>13:20:02 23 standard diagnostic statistics, but that's not the</p> <p>13:20:05 24 question being addressed in the model. So it has</p> <p>13:20:09 25 nothing to do with whether you're able to predict the</p> | <p style="text-align: right;">168</p> <p>13:21:35 1 was a New York Times best seller title of hard cover</p> <p>13:21:41 2 advice published by Macmillan that I wasn't injured,</p> <p>13:21:45 3 correct?</p> <p>13:21:45 4 MR. FRIEDMAN: Objection, form.</p> <p>13:21:46 5 THE WITNESS: I haven't got that memorized.</p> <p>13:21:48 6 There are specific categories of books for which</p> <p>13:21:51 7 there is no anticompetitive effect, yes, but I</p> <p>13:21:55 8 don't -- I don't have them memorized. They're listed</p> <p>13:21:57 9 in the report, and that's not reasonable for me to</p> <p>13:22:01 10 memorize them.</p> <p>13:22:02 11 <b>Q. MR. SWANSON: Well, there's one in your</b></p> <p>13:22:04 12 <b>report. I'm not making any secrets out of this.</b></p> <p>13:22:07 13 <b>Your report, Exhibit 1, if you want to turn to it.</b></p> <p>13:22:10 14 A. Yeah. Well, there's actually discussion in</p> <p>13:22:13 15 the main body of this phenomenon. So it's not true</p> <p>13:22:17 16 that I only mentioned one.</p> <p>13:22:23 17 Okay. Where are you?</p> <p>13:22:25 18 <b>Q. I was focusing on the negative --</b></p> <p>13:22:28 19 MR. FRIEDMAN: Exhibit 1?</p> <p>13:22:28 20 <b>Q. MR. SWANSON: -- percentage in Exhibit 1 to</b></p> <p>13:22:32 21 <b>Exhibit 1, negative 38.4 percent.</b></p> <p>13:22:40 22 A. Yeah, so?</p> <p>13:22:41 23 <b>Q. What does that mean?</b></p> <p>13:22:42 24 A. It means that there is a collectivity of</p> <p>13:22:46 25 coefficients that affect a transactions price, and</p>                                                                                                                                                        |
| <p style="text-align: right;">167</p> <p>13:20:12 1 effect of the collusive agreement.</p> <p>13:20:13 2 Whether you're able to produce the effect of</p> <p>13:20:17 3 the collusive agreement depends on the ability to</p> <p>13:20:19 4 explain the overall price variation, not the power of</p> <p>13:20:23 5 any specific coefficient.</p> <p>13:20:24 6 <b>Q. Well, doesn't the specific coefficient</b></p> <p>13:20:27 7 <b>determine what a particular member of the class gets</b></p> <p>13:20:29 8 <b>by way of damage recovery?</b></p> <p>13:20:31 9 A. Only insofar as it's interacted with the</p> <p>13:20:39 10 collusion variable. The issue is what's the price</p> <p>13:20:43 11 they would have been charged, which is the cumulative</p> <p>13:20:45 12 effect of everything, and then what's the price they</p> <p>13:20:48 13 actually were charged. All right?</p> <p>13:20:50 14 That's -- that's what the model is attempting</p> <p>13:20:53 15 to do, and the collusion variable is stuck in there</p> <p>13:20:57 16 as an explainer of differences in prices within the</p> <p>13:21:01 17 model, and then you're taking it away and taking it</p> <p>13:21:04 18 out to predict the but-for price.</p> <p>13:21:07 19 And so what matters is the -- not a</p> <p>13:21:11 20 particular coefficient, but the interactions of the</p> <p>13:21:15 21 coefficients together, including the collusion</p> <p>13:21:19 22 coefficient, to produce a prediction of price.</p> <p>13:21:21 23 <b>Q. Your model tells us, as you interpret it,</b></p> <p>13:21:28 24 <b>does it not, that if I'm a member of the class and</b></p> <p>13:21:31 25 <b>the only e-book I purchased during the class period</b></p>                                          | <p style="text-align: right;">169</p> <p>13:22:49 1 the Macmillan identifier is negative relative to the</p> <p>13:22:51 2 baseline. All right?</p> <p>13:22:53 3 So that means on average Macmillan prices</p> <p>13:22:55 4 were lower, adjusting for everything else, than the</p> <p>13:22:59 5 other publishers. That's what it means.</p> <p>13:23:01 6 It doesn't mean that there were no damages</p> <p>13:23:04 7 associated with Macmillan. It just says that with</p> <p>13:23:06 8 that particular variable Macmillan is cheaper. Then</p> <p>13:23:10 9 when you combine it with all the other variables, you</p> <p>13:23:13 10 can get categories in which Macmillan was cheaper</p> <p>13:23:15 11 within holding constant all the other variables, and</p> <p>13:23:19 12 that's what the main body of the report mentions, is</p> <p>13:23:23 13 all the ones where when you take into account</p> <p>13:23:28 14 everything a particular category of Macmillan book is</p> <p>13:23:30 15 cheaper than the predicted competitive benchmark</p> <p>13:23:34 16 price.</p> <p>13:23:35 17 <b>Q. If I am a member of the class and I bought a</b></p> <p>13:23:39 18 <b>book in this category from Macmillan where you have</b></p> <p>13:23:44 19 <b>your negative 38.4 percent entry, in your opinion,</b></p> <p>13:23:49 20 <b>was I injured and do I have a right to collect</b></p> <p>13:23:51 21 <b>damages?</b></p> <p>13:23:51 22 A. You can't answer that question by looking at</p> <p>13:23:53 23 one coefficient. That's what the explanation in the</p> <p>13:23:56 24 main body of the report is. You have to look at the</p> <p>13:23:58 25 cumulative effect of all the coefficients for that</p> |



| 174      |    | 176                                                          |                                                                        |
|----------|----|--------------------------------------------------------------|------------------------------------------------------------------------|
| 13:28:59 | 1  | times, using Exhibit 1 and Exhibit 2, we can                 | 13:31:14 1 MR. FRIEDMAN: See the list of consumers?                    |
| 13:29:02 | 2  | calculate my damages --                                      | 13:31:16 2 MR. SWANSON: See the individual damages that                |
| 13:29:03 | 3  | MR. FRIEDMAN: Objection, form.                               | 13:31:19 3 apparently can be produced at a snap of a finger with       |
| 13:29:04 | 4  | <b>Q. MR. SWANSON: -- if I tell you what price I</b>         | 13:31:23 4 transactions data.                                          |
| 13:29:06 | 5  | <b>paid for it?</b>                                          | 13:31:24 5 MR. FRIEDMAN: Okay. Well, he can answer,                    |
| 13:29:07 | 6  | MR. FRIEDMAN: Objection, form.                               | 13:31:26 6 but, Dan, I think that you're asking him for a              |
| 13:29:08 | 7  | THE WITNESS: Among other things. I mean, I                   | 13:31:30 7 requirement that is going to come after Judge Cote's        |
| 13:29:11 | 8  | actually have the transaction record. So all I               | 13:31:34 8 order after the jury trial. So I don't think that's         |
| 13:29:15 | 9  | actually need to know is your name or your customer          | 13:31:37 9 something that's legally required, but go ahead and         |
| 13:29:18 | 10 | identification number for all the retailers, and then        | 13:31:40 10 ask your question.                                         |
| 13:29:23 | 11 | I can go to the database, pluck out every transaction        | 13:31:41 11 THE WITNESS: The answer is I was not                       |
| 13:29:29 | 12 | you made and calculate the predicted price and the           | 13:31:44 12 intending to predict -- to do a damages calculation        |
| 13:29:32 | 13 | actual price for every single e-book you bought and          | 13:31:48 13 on a transaction-by-transaction basis for every            |
| 13:29:36 | 14 | it's done.                                                   | 13:31:50 14 record in the transaction record. What I instead was       |
| 13:29:37 | 15 | <b>Q. MR. SWANSON: If we give Exhibit 1 to</b>               | 13:31:53 15 attempting to do was explain how it would be done          |
| 13:29:42 | 16 | <b>Exhibit 1 and Exhibit 2 to Exhibit 1 to a neutral</b>     | 13:31:56 16 and, number two, to use it to characterize what            |
| 13:29:48 | 17 | <b>administrator and class members submit their purchase</b> | 13:32:00 17 fraction of transactions actually had damages,             |
| 13:29:51 | 18 | <b>records, will the damage numbers be calculable by</b>     | 13:32:02 18 because I do know the answer to that. All right?           |
| 13:29:57 | 19 | <b>that independent neutral administrator?</b>               | 13:32:05 19 But I was not intending to produce individual damages      |
| 13:29:58 | 20 | A. Yes.                                                      | 13:32:09 20 estimates from the equation for every single               |
| 13:29:59 | 21 | <b>Q. Just from these pages?</b>                             | 13:32:12 21 transaction in the transactions record.                    |
| 13:30:01 | 22 | A. From the whole regression equation. This is               | 13:32:15 22 Now, if somebody asks me to do that, I could               |
| 13:30:04 | 23 | a -- from all the coefficients on all the                    | 13:32:18 23 do it. Or I, rather, I could employ all of the             |
| 13:30:07 | 24 | regressions, yes. It's just simply plugging in the           | 13:32:22 24 economists at Ashenfelter & Ashmore for a week doing       |
| 13:30:10 | 25 | values. You have the regression equation, which is           | 13:32:27 25 it, and I could produce the 10,000-page-long               |
| 175      |    | 177                                                          |                                                                        |
| 13:30:13 | 1  | just a log linear equation, and it says, you know,           | 13:32:30 1 document. Indeed, your experts could do the same            |
| 13:30:17 | 2  | here are all the independent variables. Take those           | 13:32:33 2 thing.                                                      |
| 13:30:22 | 3  | values, put them into the equation and predict a             | 13:32:34 3 The hard part is not once you've got the                    |
| 13:30:26 | 4  | price, and that's the but-for price; and the same            | 13:32:37 4 regression calculating what the predicted price is.         |
| 13:30:30 | 5  | calculation is used for every single transaction.            | 13:32:39 5 That's not the hard part. That's easy. It's just a          |
| 13:30:33 | 6  | So you could actually produce -- go back to                  | 13:32:42 6 repetitive arithmetic calculation that computers are        |
| 13:30:36 | 7  | the transaction records of all the retailers and             | 13:32:47 7 really good at.                                             |
| 13:30:38 | 8  | produce a document that was 10,000 pages long which          | 13:32:48 8 <b>Q. MR. SWANSON: And you've identified no way</b>         |
| 13:30:42 | 9  | is the damages for every single transaction by every         | 13:32:50 9 <b>for individual damages consistent with your model to</b> |
| 13:30:45 | 10 | single e-retailer during the damages period.                 | 13:32:54 10 <b>be calculated without the use of your regression</b>    |
| 13:30:48 | 11 | <b>Q. And have you produced that?</b>                        | 13:32:57 11 <b>equation run on a computer.</b>                         |
| 13:30:50 | 12 | A. No, I haven't done the calculation, but I've              | 13:33:00 12 A. Well, there's another way to do it. I mean,             |
| 13:30:53 | 13 | explained how to do it.                                      | 13:33:04 13 you could produce the predicted price for every            |
| 13:30:54 | 14 | <b>Q. Are you planning on doing that at some point</b>       | 13:33:06 14 single title in every single month. And there              |
| 13:30:56 | 15 | <b>before trial?</b>                                         | 13:33:12 15 1.3 million of them. They were on average probably         |
| 13:30:57 | 16 | MR. FRIEDMAN: Sorry. Doing what?                             | 13:33:15 16 sold for six months to a year. So we could produce a       |
| 13:30:59 | 17 | MR. SWANSON: Just what he just described.                    | 13:33:18 17 list of, say, 10 million titles by month and have the      |
| 13:31:01 | 18 | Getting the transaction records, running it through          | 13:33:27 18 but-for price of every single one of those listed,         |
| 13:31:03 | 19 | his equation, getting the specific damages for each          | 13:33:30 19 and then anybody could look up that title in that          |
| 13:31:06 | 20 | member of the class.                                         | 13:33:33 20 month and figure out what the competitive benchmark        |
| 13:31:06 | 21 | MR. FRIEDMAN: And giving it to an                            | 13:33:37 21 price was and subtract that from whatever they paid.       |
| 13:31:08 | 22 | administrator for him to do what he says could easily        | 13:33:40 22 It would be something this thick, but, yes,                |
| 13:31:11 | 23 | be done?                                                     | 13:33:43 23 we could do that.                                          |
| 13:31:11 | 24 | MR. SWANSON: No, giving it to us so we can                   | 13:33:44 24 <b>Q. And that's not something you've done.</b>            |
| 13:31:13 | 25 | see it before trial.                                         | 13:33:46 25 A. I haven't done it, but we've actually done              |

| 178                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 180                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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| <p>13:33:49 1 some examples, yes, but we -- I haven't done -- I</p> <p>13:33:53 2 haven't done it for every single title every single</p> <p>13:33:56 3 month.</p> <p>13:33:56 4 <b>Q. Exhibit 1 to Exhibit 1 is then an</b></p> <p>13:34:00 5 <b>illustrative or a hypothetical set of coefficients?</b></p> <p>13:34:05 6 <b>This does not --</b></p> <p>13:34:06 7 A. No. No, these are the real thing. There's</p> <p>13:34:09 8 nothing hypothetical about them. This is the result</p> <p>13:34:11 9 of the regression model, and it's just some of the</p> <p>13:34:15 10 coefficients. That's all. You know what the</p> <p>13:34:17 11 coefficients are because they're in the backup.</p> <p>13:34:19 12 <b>Q. So you could actually -- I mean, do you need</b></p> <p>13:34:22 13 <b>to run it through the model? I mean, don't you --</b></p> <p>13:34:25 14 <b>you don't have the ability to reduce this all to a</b></p> <p>13:34:28 15 <b>formula that can be put on a piece of paper?</b></p> <p>13:34:31 16 A. No, it is a formula. The formula is the</p> <p>13:34:34 17 regression. You know this because you've had enough</p> <p>13:34:36 18 economics to know it. We have a regression equation</p> <p>13:34:39 19 and we have estimated the coefficients. It's just an</p> <p>13:34:42 20 equation.</p> <p>13:34:42 21 It's like, you know, X equals A plus CY. So</p> <p>13:34:46 22 all you do is you know what A is, you know what C is,</p> <p>13:34:52 23 and you know what Y is and you can calculate X. And</p> <p>13:34:53 24 you put the formula in the computer and you plug in</p> <p>13:34:56 25 for any given transaction what the values of the</p> | <p>13:36:31 1 MR. FRIEDMAN: Just for the record,</p> <p>13:36:33 2 Mr. Swanson is referring to Exhibit 1 to Exhibit 1.</p> <p>13:36:43 3 THE WITNESS: What happened to panel B?</p> <p>13:36:51 4 <b>Q. MR. SWANSON: It's down here.</b></p> <p>13:36:52 5 A. Oh, okay.</p> <p>13:36:53 6 <b>Q. It took me a while myself.</b></p> <p>13:36:55 7 A. Now, what's the question again?</p> <p>13:37:05 8 <b>Q. Are these incremental overcharge variables</b></p> <p>13:37:10 9 <b>calculated on a publisher-by-publisher basis?</b></p> <p>13:37:15 10 A. No, these are not on a publisher-by-publisher</p> <p>13:37:20 11 basis. The -- these are something that would be true</p> <p>13:37:27 12 for a particular book title, but they would take --</p> <p>13:37:35 13 they are not inter -- those are not interacted with</p> <p>13:37:38 14 the publisher variables.</p> <p>13:37:39 15 <b>Q. So these are averages across publishers?</b></p> <p>13:37:42 16 A. Well, yes and no. I mean, to some degree the</p> <p>13:37:45 17 publisher variables are also in the equation. So</p> <p>13:37:48 18 some of the variation attributable to these things is</p> <p>13:37:51 19 going to be there. These are departures due to this</p> <p>13:37:55 20 characteristic that are true for all the publishers.</p> <p>13:37:59 21 <b>Q. So you view these each as applying to</b></p> <p>13:38:03 22 <b>multiple publishers?</b></p> <p>13:38:04 23 A. Yes.</p> <p>13:38:05 24 <b>Q. And why didn't you allow these to vary across</b></p> <p>13:38:09 25 <b>publishers?</b></p>                     |
| 179                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | 181                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <p>13:34:59 1 independent variables are and produce the predicted</p> <p>13:35:03 2 price.</p> <p>13:35:03 3 <b>Q. Can you use that methodology to determine</b></p> <p>13:35:05 4 <b>which members of the class were not injured?</b></p> <p>13:35:07 5 A. That's precisely what we did in the report is</p> <p>13:35:10 6 identify that fraction for which the predicted price</p> <p>13:35:12 7 was -- was greater than the actual price.</p> <p>13:35:16 8 <b>Q. Well, you haven't looked at individual</b></p> <p>13:35:18 9 <b>transactions, have you?</b></p> <p>13:35:19 10 A. No, we looked at the averages, yes.</p> <p>13:35:21 11 <b>Q. Right. So you don't know how many members of</b></p> <p>13:35:25 12 <b>the class actually, based on their particular</b></p> <p>13:35:27 13 <b>purchasing patterns, the time at which they</b></p> <p>13:35:30 14 <b>purchased, the titles that they purchased were</b></p> <p>13:35:31 15 <b>actually not injured.</b></p> <p>13:35:34 16 A. Well, the -- we haven't calculated -- again,</p> <p>13:35:39 17 we have not done the calculation at the level of</p> <p>13:35:42 18 individual titles in individual months for every</p> <p>13:35:44 19 single transaction, no. We've only done it for the</p> <p>13:35:48 20 averages over the four-week period.</p> <p>13:35:51 21 <b>Q. Do the coefficients in Exhibit 1 apply to --</b></p> <p>13:36:04 22 <b>strike that.</b></p> <p>13:36:04 23 <b>The four coefficients that you calculate as</b></p> <p>13:36:15 24 <b>reported in panel B on Exhibit 1, have those</b></p> <p>13:36:23 25 <b>calculated on a publisher-by-publisher basis?</b></p>                            | <p>13:38:09 1 A. We were getting into the world of serious</p> <p>13:38:14 2 multicollinearity causing the equation to invert the</p> <p>13:38:21 3 matrix of observations with sufficient</p> <p>13:38:25 4 multicollinearity.</p> <p>13:38:27 5 <b>Q. Do these incremental overcharge variables</b></p> <p>13:38:30 6 <b>also apply to Random House titles?</b></p> <p>13:38:33 7 A. They apply to anything.</p> <p>13:38:34 8 <b>Q. Does that mean that the price increases</b></p> <p>13:38:37 9 <b>associated with Random House's switch to agency are</b></p> <p>13:38:40 10 <b>included in these incremental overcharge variables?</b></p> <p>13:38:42 11 A. Well, these variables take values during all</p> <p>13:38:46 12 periods depending on the characteristics of the book,</p> <p>13:38:49 13 yes.</p> <p>13:38:51 14 <b>Q. What percentage overcharge is consistent with</b></p> <p>13:39:00 15 <b>a \$9.99 but-for price and \$12.99 actual price?</b></p> <p>13:39:07 16 MR. FRIEDMAN: Objection, form.</p> <p>13:39:09 17 THE WITNESS: If the question is you</p> <p>13:39:15 18 predicted that the price would be \$9.99 and it's \$3.</p> <p>13:39:23 19 <b>Q. MR. SWANSON: And that's a little over</b></p> <p>13:39:25 20 <b>30 percent?</b></p> <p>13:39:25 21 A. Yes.</p> <p>13:39:26 22 <b>Q. And if you predicted that the but-for price</b></p> <p>13:39:30 23 <b>was 9.99 and the transaction price in the real world</b></p> <p>13:39:34 24 <b>was 14.99, what -- what is the overcharge percentage</b></p> <p>13:39:40 25 <b>associated with that scenario?</b></p> |



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| <p style="text-align: right;">182</p> <p>13:39:41 1 A. 50 percent.</p> <p>13:39:42 2 <b>Q. A little bit over 50?</b></p> <p>13:39:44 3 A. Yeah.</p> <p>13:39:45 4 <b>Q. Do any of your formulaic predictions predict precisely 9.99 but-for pricing?</b></p> <p>13:39:52 5</p> <p>13:39:57 6 A. I don't recall what the precise predictions</p> <p>13:40:02 7 for anything are. Don't remember. I, you know, I</p> <p>13:40:09 8 don't recall what those numbers are.</p> <p>13:40:10 9 <b>Q. Is it your view that the scenario of a 9.99 but-for price and a 12.99 actual price is a very common one as the plaintiffs' damage expert?</b></p> <p>13:40:16 10</p> <p>13:40:20 11</p> <p>13:40:26 12 MR. FRIEDMAN: Objection, form.</p> <p>13:40:27 13 THE WITNESS: What do you mean by common?</p> <p>13:40:30 14 <b>Q. MR. SWANSON: Do you think that was the most common instance of overcharge?</b></p> <p>13:40:32 15</p> <p>13:40:34 16 MR. FRIEDMAN: Objection, form.</p> <p>13:40:36 17 THE WITNESS: I don't know whether it was the</p> <p>13:40:37 18 most common. I mean, to begin with, the prices</p> <p>13:40:40 19 you're quoting are for new releases. They're less</p> <p>13:40:43 20 than half of the transactions. And then there are</p> <p>13:40:45 21 differences in the prices of new releases. So I</p> <p>13:40:48 22 don't know how to characterize most or more common.</p> <p>13:40:54 23 Those are too vague for me.</p> <p>13:40:56 24 <b>Q. MR. SWANSON: Are these overcharge scenarios that are common at all, in your view?</b></p> <p>13:40:58 25</p> | <p style="text-align: right;">184</p> <p>13:42:04 1 Nothing -- nothing -- the probably of anything being</p> <p>13:42:07 2 a particular number is not zero, but I don't know</p> <p>13:42:09 3 what it is. I haven't looked at the distribution of</p> <p>13:42:11 4 predicted prices, so I can't tell you the frequency</p> <p>13:42:13 5 of various prices.</p> <p>13:42:15 6 <b>Q. Well, you just told me something that somewhat belied the fact that you didn't know anything. Now --</b></p> <p>13:42:20 8</p> <p>13:42:21 9 MR. FRIEDMAN: Objection, form.</p> <p>13:42:22 10 <b>Q. MR. SWANSON: How likely is it that the number of prices that your model predicts in the but-for world are in less than five percent of the instances 9.99?</b></p> <p>13:42:24 11</p> <p>13:42:29 12</p> <p>13:42:35 13</p> <p>13:42:38 14 MR. FRIEDMAN: Objection, form.</p> <p>13:42:39 15</p> <p>13:42:42 16 THE WITNESS: I haven't -- I haven't</p> <p>13:42:44 17 calculated that number. I don't -- I don't know.</p> <p>13:42:47 18 <b>Q. MR. SWANSON: If your model predicted only one percent of the prices in the but-for world were 9.99, would that cause you to reexamine the reliability of your model?</b></p> <p>13:42:51 19</p> <p>13:42:53 20</p> <p>13:42:54 21 A. No.</p> <p>13:42:55 22 MR. FRIEDMAN: Objection, form.</p> <p>13:42:56 23</p> <p>13:42:58 24 THE WITNESS: Not necessarily. I'd have to</p> <p>13:42:58 25 know a lot more.</p> <p>13:42:58 25 <b>Q. MR. SWANSON: Zero percent? What if it were</b></p>                                                                                                                                                          |
| <p style="text-align: right;">183</p> <p>13:40:59 1 MR. FRIEDMAN: Objection, form.</p> <p>13:41:00 2 THE WITNESS: You have to be more precise</p> <p>13:41:04 3 about what common means. I mean, there are some that</p> <p>13:41:06 4 happen more often than others, but I don't know what</p> <p>13:41:09 5 you mean by common.</p> <p>13:41:09 6 <b>Q. MR. SWANSON: Well, what percentage of but-for pricing as predicted by your damage model are \$9.99?</b></p> <p>13:41:11 7</p> <p>13:41:18 8</p> <p>13:41:19 9 A. I don't know what percentage of them are. I</p> <p>13:41:23 10 don't regard it as an important question, but I don't</p> <p>13:41:25 11 know what they are.</p> <p>13:41:25 12 <b>Q. Is it less than ten percent?</b></p> <p>13:41:27 13</p> <p>13:41:27 13 A. Is there something about I don't know you</p> <p>13:41:29 14 don't understand?</p> <p>13:41:30 15 <b>Q. Is there something about I'm a lawyer that you don't understand?</b></p> <p>13:41:33 16</p> <p>13:41:34 17 A. I'm not going to give a Clintonesque</p> <p>13:41:40 18 definition of I don't know. I'm just going to say I</p> <p>13:41:42 19 don't know.</p> <p>13:41:42 20 <b>Q. Well, I don't know, in my sad experience as a lawyer, sometimes gets qualified when the numbers get bandied about.</b></p> <p>13:41:50 21</p> <p>13:41:54 22</p> <p>13:41:55 23 <b>So you don't know if it's zero percent.</b></p> <p>13:41:58 24 A. Oh, it would be extremely unlikely to be</p> <p>13:42:01 25 zero percent, but I don't know what it is.</p>                                     | <p style="text-align: right;">185</p> <p>13:43:01 1 <b>zero percent?</b></p> <p>13:43:01 2</p> <p>13:43:04 3 A. No, that's not -- that's not a valid measure</p> <p>13:43:04 3 of reliability. All right? The issue is not that.</p> <p>13:43:07 4 The issue is the extent to which it's doing a good</p> <p>13:43:12 5 job predicting the overcharge.</p> <p>13:43:15 6 It could be, you know, small differences in</p> <p>13:43:18 7 the predicted but-for price. Like, suppose we got</p> <p>13:43:22 8 every single one of them that should have been 9.99</p> <p>13:43:26 9 as 9.98. That's not important. All right? If every</p> <p>13:43:30 10 single one that was supposed to be 9.99 was \$2.36,</p> <p>13:43:35 11 then that would be important, or if it was \$27.14,</p> <p>13:43:39 12 that would be important. But just knowing what</p> <p>13:43:41 13 fraction of them was exactly 9.99 is not relevant to</p> <p>13:43:45 14 any known or suspected question that I would have</p> <p>13:43:48 15 about the quality of the model.</p> <p>13:43:50 16 <b>Q. So absolutely unimportant to you what percentage are 9.99.</b></p> <p>13:43:52 17</p> <p>13:43:53 18 MR. FRIEDMAN: Objection, form.</p> <p>13:43:54 19</p> <p>13:43:56 20 THE WITNESS: I don't know why I would care</p> <p>13:44:00 21 to know the percentage of them that predicted 9.99,</p> <p>13:44:04 22 yes. I can't think of a good reason to do that. You</p> <p>13:44:07 23 could do it, but I don't know what the point would</p> <p>13:44:07 24 be.</p> <p>13:44:07 24 <b>Q. MR. SWANSON: Would your answers be different if I asked you the same questions but specified a</b></p> <p>13:44:08 25</p> |

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| <p style="text-align: right;">186</p> <p>13:44:10 1 <b>range of from, say, 9.75 to 10.25?</b></p> <p>13:44:15 2 A. That comes closer to being something that</p> <p>13:44:19 3 matters, yes. I mean, but you're leaving out the</p> <p>13:44:22 4 other shoe, which is what actually was the category</p> <p>13:44:26 5 of the book that's not being 9.99. Is it one that</p> <p>13:44:30 6 you really should have predicted in the, say, the</p> <p>13:44:35 7 Amazon data prior to the institution of the agency</p> <p>13:44:39 8 problem model.</p> <p>13:44:40 9 If you haven't done a good job of identifying</p> <p>13:44:43 10 the books they would have set the price at 9.99, then</p> <p>13:44:48 11 that's important; but if that's true, then I don't</p> <p>13:44:50 12 know how you get an R square of .90.</p> <p>13:44:55 13 So, you know, it's -- the question has to be</p> <p>13:44:58 14 answered in the context of a regression that's</p> <p>13:45:01 15 explaining 90 percent of the variance, and the</p> <p>13:45:04 16 average prices for the books that were 9.99 is going</p> <p>13:45:08 17 to be 9.99. So if you're not explaining that, I</p> <p>13:45:12 18 don't know how get an R square of .90 if they</p> <p>13:45:15 19 constitute more than a trivial fraction of the sales.</p> <p>13:45:19 20 <b>Q. What happens when you get a within R squared</b></p> <p>13:45:26 21 <b>of .12? What does that tell you?</b></p> <p>13:45:28 22 A. What that's telling me is that within a</p> <p>13:45:30 23 month-long period, there's lots of variation in price</p> <p>13:45:34 24 around the average price; and, of course, you're not</p> <p>13:45:37 25 explaining it because you're not dealing -- you don't</p> | <p style="text-align: right;">188</p> <p>13:47:10 1 representative. Like the 90-day expiration date, all</p> <p>13:47:14 2 right, can happen after two weeks of the four weeks.</p> <p>13:47:17 3 So what you're reducing is the power of that variable</p> <p>13:47:20 4 to explain variation in price.</p> <p>13:47:23 5 <b>Q. Suppose a consumer comes forward and presents</b></p> <p>13:47:32 6 <b>evidence that in the middle of the book -- in the</b></p> <p>13:47:36 7 <b>middle of the month they bought a book that was --</b></p> <p>13:47:45 8 <b>had just come off its 90-day period, new release that</b></p> <p>13:47:50 9 <b>had just come off its 90-day period. Typically</b></p> <p>13:47:55 10 <b>coming off the 90-day period for Amazon would result</b></p> <p>13:47:58 11 <b>in a higher e-book price, would it not?</b></p> <p>13:48:01 12 A. Typically, yes.</p> <p>13:48:02 13 <b>Q. And the approach of your model will use data</b></p> <p>13:48:07 14 <b>based on averaging all of the transactions in that</b></p> <p>13:48:09 15 <b>month, correct?</b></p> <p>13:48:10 16 A. That's correct.</p> <p>13:48:11 17 <b>Q. So as you just pointed out, it could be that</b></p> <p>13:48:16 18 <b>two weeks in the price might have gone up under the</b></p> <p>13:48:20 19 <b>Amazon pricing model, but your model will treat the</b></p> <p>13:48:25 20 <b>average price of that book throughout the month which</b></p> <p>13:48:28 21 <b>will give weight to the lower price before the price</b></p> <p>13:48:34 22 <b>hike kicks in.</b></p> <p>13:48:36 23 A. It will give weight to both, but the average</p> <p>13:48:39 24 will be in between. So those who bought before the</p> <p>13:48:43 25 change occurred, their damages will be</p> |
| <p style="text-align: right;">187</p> <p>13:45:40 1 have a transactions model.</p> <p>13:45:41 2 If you did estimate a transactions model with</p> <p>13:45:46 3 even the same variables, your ability to explain</p> <p>13:45:49 4 individual transactions would be better than that,</p> <p>13:45:52 5 because you're just not -- you're not giving the</p> <p>13:45:55 6 model the chance to even try to explain those because</p> <p>13:45:58 7 that's not the input to the model.</p> <p>13:46:00 8 <b>Q. Well, do people purchase at average prices or</b></p> <p>13:46:06 9 <b>do they purchase at actual individual prices --</b></p> <p>13:46:09 10 MR. FRIEDMAN: Objection, form.</p> <p>13:46:10 11 <b>Q. MR. SWANSON: -- at a given point in time?</b></p> <p>13:46:12 12 A. Well, some do, some don't. The -- the range</p> <p>13:46:16 13 of prices being charged obviously is not something</p> <p>13:46:21 14 where every single price is right at the average.</p> <p>13:46:24 15 Most of them are not at the average or else you</p> <p>13:46:27 16 wouldn't have the variation that you do within --</p> <p>13:46:31 17 within the four-month period.</p> <p>13:46:33 18 MR. FRIEDMAN: Four-week.</p> <p>13:46:34 19 THE WITNESS: Four-week period. Excuse me.</p> <p>13:46:36 20 <b>Q. MR. SWANSON: Are there e-book prices that</b></p> <p>13:46:56 21 <b>predictably change within a four-week period that</b></p> <p>13:46:59 22 <b>your model is not taking account of?</b></p> <p>13:47:01 23 A. Well, to the extent that indicator variable</p> <p>13:47:04 24 changes its stripe in the middle of the period, then,</p> <p>13:47:08 25 you know, there's a -- it's not completely</p>                                     | <p style="text-align: right;">189</p> <p>13:48:46 1 underestimated; and for ones that bought after, their</p> <p>13:48:49 2 damages will be overestimated. But on average,</p> <p>13:48:51 3 they'll cancel out.</p> <p>13:48:53 4 <b>Q. And some consumers who will not have been</b></p> <p>13:48:59 5 <b>injured directly under your methodology as a result</b></p> <p>13:49:01 6 <b>of that be in line to collect damages, correct?</b></p> <p>13:49:04 7 MR. FRIEDMAN: Objection, form.</p> <p>13:49:05 8 THE WITNESS: Well, that -- that's only true</p> <p>13:49:08 9 if the predicted price in the next four-week period</p> <p>13:49:11 10 would have been at or above the price they actually</p> <p>13:49:14 11 paid. Because, you know, in the next period, nothing</p> <p>13:49:20 12 else will have changed except now we have the full</p> <p>13:49:22 13 effect of the post 90-day thing. So you're going to</p> <p>13:49:25 14 have a different predicted price there. And they are</p> <p>13:49:29 15 going to have zero damages as opposed to what they</p> <p>13:49:33 16 get only if in that period you would have predicted</p> <p>13:49:36 17 no anticompetitive harm for that category, and yet in</p> <p>13:49:42 18 reality what the model is about is saying that there</p> <p>13:49:45 19 will be anticompetitive harm for everybody. It just</p> <p>13:49:48 20 will differ depending whether you're before 90 days</p> <p>13:49:51 21 or after 90 days.</p> <p>13:49:53 22 <b>Q. Are you planning on taking that into account</b></p> <p>13:49:55 23 <b>or can you take that into account?</b></p> <p>13:49:57 24 A. The way to take it into account, which would</p> <p>13:50:02 25 require more work, a lot more time, would be to</p>             |

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| <p style="text-align: right;">190</p> <p>13:50:05 1 reduce the -- the time period for which the average</p> <p>13:50:09 2 was taken down to a week or something like that, down</p> <p>13:50:13 3 to something closer to the frequency of the changes</p> <p>13:50:16 4 in the variables.</p> <p>13:50:17 5 <b>Q. And that is something that you could do.</b></p> <p>13:50:28 6 A. It's something you can do with enough time,</p> <p>13:50:30 7 sure. You have to reconstitute the aggregation of</p> <p>13:50:35 8 the data. Rather than just rely on stuff that was</p> <p>13:50:37 9 done in the liability phase, you'd have to actually</p> <p>13:50:41 10 go back and reconstitute the aggregation from the</p> <p>13:50:44 11 transactions record to average periods and do that.</p> <p>13:50:47 12 MR. FRIEDMAN: Would you like to have us</p> <p>13:50:48 13 incur that cost in the distribution phase? Just give</p> <p>13:50:52 14 me a heads-up.</p> <p>13:50:56 15 MR. SWANSON: I don't know what phase you get</p> <p>13:50:58 16 to unless you meet the requirement of moving</p> <p>13:51:01 17 something up. But we can debate that offline.</p> <p>13:51:08 18 <b>Q. Sitting here right now, obviously you don't</b></p> <p>13:51:14 19 <b>have your computer, nor would Mr. Friedman allow me</b></p> <p>13:51:19 20 <b>to make you run some calculations here live, but if I</b></p> <p>13:51:23 21 <b>gave you some hypothetical information about a</b></p> <p>13:51:25 22 <b>particular consumer purchasing on a particular day,</b></p> <p>13:51:29 23 <b>all of the information that corresponds to the</b></p> <p>13:51:33 24 <b>variables that you've used, would you be able to</b></p> <p>13:51:35 25 <b>figure out how your methodology calculates the</b></p> | <p style="text-align: right;">192</p> <p>13:52:49 1 for you the 10,000-page computer dump of the but-for</p> <p>13:52:55 2 price of every title in every month, then you could</p> <p>13:52:59 3 just look at that and do it yourself.</p> <p>13:53:01 4 <b>Q. Well, you've answered my question. I</b></p> <p>13:53:03 5 <b>appreciate that.</b></p> <p>13:53:05 6 A. Shall we take a break?</p> <p>13:53:06 7 MR. SWANSON: Yeah.</p> <p>13:53:07 8 VIDEOGRAPHER: We are now going off the</p> <p>13:53:09 9 record, the time is 1:52.</p> <p>14:16:07 10 (Deposition recess taken.)</p> <p>14:16:07 11 VIDEOGRAPHER: We're now going back on the</p> <p>14:16:19 12 record. The time is 2:15.</p> <p>14:16:22 13 <b>Q. MR. SWANSON: Professor Noll, you state in</b></p> <p>14:16:25 14 <b>your report that:</b></p> <p>14:16:27 15 <b>"Anticompetitive conduct by the</b></p> <p>14:16:28 16 <b>defendants caused prices to be higher for</b></p> <p>14:16:30 17 <b>e-books that account for 99.5% of e-book</b></p> <p>14:16:36 18 <b>sales by the publisher defendants."</b></p> <p>14:16:40 19 <b>Do you recall that?</b></p> <p>14:16:40 20 A. Yes.</p> <p>14:16:40 21 <b>Q. How did you compute the 99.5 percent figure?</b></p> <p>14:16:44 22 A. It's a fraction that are accounted for by the</p> <p>14:16:49 23 actual price being above the predicted price.</p> <p>14:16:51 24 <b>Q. And did you make that computation at the</b></p> <p>14:16:54 25 <b>level of individual transactions?</b></p>                                                                                                                              |
| <p style="text-align: right;">191</p> <p>13:51:39 1 <b>overcharge for that consumer as you sit here without</b></p> <p>13:51:42 2 <b>using your computer?</b></p> <p>13:51:43 3 A. I have no idea until you ask the question</p> <p>13:51:46 4 because the question was sufficiently vague that I'm</p> <p>13:51:48 5 not sure what's coming. So I'd hate to answer yes</p> <p>13:51:52 6 and then not be able to answer the question or no and</p> <p>13:51:56 7 then be able to answer it. So maybe you should try</p> <p>13:51:58 8 and I can tell you whether that's sufficient</p> <p>13:52:00 9 information for me to be able to answer it.</p> <p>13:52:02 10 <b>Q. Well, I mean, if I bought Ted Kennedy's book</b></p> <p>13:52:07 11 <b>True Compass on April 1st, 2010, and I bought it from</b></p> <p>13:52:10 12 <b>Apple, could you tell me what my -- how much I was</b></p> <p>13:52:15 13 <b>overcharged?</b></p> <p>13:52:15 14 A. Yes.</p> <p>13:52:16 15 <b>Q. How much?</b></p> <p>13:52:17 16 A. By plugging in the values associated with</p> <p>13:52:21 17 that title into the regression equation, producing a</p> <p>13:52:25 18 but-for price and then subtracting that from the</p> <p>13:52:28 19 price you actually paid.</p> <p>13:52:29 20 <b>Q. If I told you what price hypothetically I</b></p> <p>13:52:33 21 <b>paid for that book, can you sitting here point me to</b></p> <p>13:52:35 22 <b>numbers in your report that would allow us to figure</b></p> <p>13:52:38 23 <b>that out? Or do you need a computer to do that?</b></p> <p>13:52:41 24 A. Depends. There's nothing in the report that</p> <p>13:52:46 25 would enable you to calculate it, but if I produce</p>                                                                           | <p style="text-align: right;">193</p> <p>14:16:56 1 A. At the level of the four-week periods.</p> <p>14:17:00 2 <b>Q. And did you make that computation at the</b></p> <p>14:17:04 3 <b>level of the individual title?</b></p> <p>14:17:06 4 A. It would be the -- let's see. What did we</p> <p>14:17:15 5 do.</p> <p>14:17:16 6 I've just forgotten sitting here whether it</p> <p>14:17:27 7 was at the title or category level. I think it</p> <p>14:17:30 8 was -- I just don't remember for sure.</p> <p>14:17:32 9 <b>Q. Let me assert that it was at the category</b></p> <p>14:17:35 10 <b>level.</b></p> <p>14:17:35 11 A. I think it was, but I'm just having a main</p> <p>14:17:39 12 memory block. I don't remember for sure.</p> <p>14:17:40 13 <b>Q. And if you calculated it at the category</b></p> <p>14:17:44 14 <b>level, in effect, what you did was compute the</b></p> <p>14:17:47 15 <b>average price effect within a category, and then to</b></p> <p>14:17:51 16 <b>the extent there was a price effect, you added up the</b></p> <p>14:17:55 17 <b>percentage of each of those categories to come up</b></p> <p>14:17:59 18 <b>with a 99.5 percent figure?</b></p> <p>14:18:01 19 A. I think that the 99.5 percent figure is based</p> <p>14:18:10 20 on the volume of sales, as I remember, as opposed to</p> <p>14:18:13 21 a count of categories. You said a count of</p> <p>14:18:15 22 categories, and I don't think it was.</p> <p>14:18:16 23 <b>Q. I agree it's not a count of categories.</b></p> <p>14:18:19 24 A. Right.</p> <p>14:18:20 25 <b>Q. I was not being very precise. I think we're</b></p> |

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| <p style="text-align: right;">194</p> <p>14:18:23 1 on the same page, but we should be on the same page</p> <p>14:18:25 2 on the record.</p> <p>14:18:26 3 You determined whether or not a category was</p> <p>14:18:29 4 affected. If it was, according to your model, then</p> <p>14:18:31 5 you added its share of sales --</p> <p>14:18:34 6 A. Right.</p> <p>14:18:35 7 Q. -- to all the other categories that your</p> <p>14:18:37 8 model indicated was affected, and that came up to a</p> <p>14:18:41 9 99.5 percent share of sales, right?</p> <p>14:18:45 10 A. Correct. The calculated damages in my model</p> <p>14:18:48 11 are positive for 99.5 percent of the volume of</p> <p>14:18:53 12 transactions, yes.</p> <p>14:18:55 13 Q. Now, that could be consistent with calculated</p> <p>14:19:04 14 impact on 40 percent of titles, could it not?</p> <p>14:19:11 15 MR. FRIEDMAN: Objection, form.</p> <p>14:19:13 16 THE WITNESS: I don't -- I think that's</p> <p>14:19:18 17 extremely implausible, no. I mean, the -- there are</p> <p>14:19:24 18 circumstances in which it could be a significant</p> <p>14:19:26 19 fraction of the titles in the category, but those</p> <p>14:19:28 20 would be where the predicted price is very close to</p> <p>14:19:31 21 the average price. If there's a big difference,</p> <p>14:19:33 22 there wouldn't -- it wouldn't be -- it wouldn't be</p> <p>14:19:37 23 any significant fraction where the predicted price</p> <p>14:19:40 24 was above the actual price.</p> <p>14:19:41 25 Q. MR. SWANSON: So you do have an opinion as to</p> | <p style="text-align: right;">196</p> <p>14:20:49 1 A. No, I think that is an implausibly low</p> <p>14:20:55 2 number, yes. The only categories in which you would</p> <p>14:20:58 3 find that would be true would be ones where the</p> <p>14:21:01 4 predicted price is very close to but still below the</p> <p>14:21:04 5 average price.</p> <p>14:21:05 6 Q. What do you think is the more reasonable</p> <p>14:21:08 7 estimate of the number of impacted titles?</p> <p>14:21:11 8 A. I don't know what it would be. There could</p> <p>14:21:13 9 be a category for which that number is true, but I</p> <p>14:21:17 10 think it's extremely unlikely it's true for all</p> <p>14:21:20 11 categories or even most categories.</p> <p>14:21:22 12 Q. And is it possible that the 99.5 figure is</p> <p>14:21:25 13 consistent with an impact in only 50 percent of</p> <p>14:21:29 14 individual transactions?</p> <p>14:21:31 15 A. I do not think that's true. I think that's</p> <p>14:21:34 16 unlikely to be the case, but we can calculate and</p> <p>14:21:37 17 figure it out. I mean, that's a task that can easily</p> <p>14:21:41 18 be done with a regression equation.</p> <p>14:21:42 19 Q. Do you have the information that would allow</p> <p>14:21:45 20 you to do that?</p> <p>14:21:46 21 A. Of course.</p> <p>14:21:46 22 Q. You would be able to determine the individual</p> <p>14:21:52 23 transactional histories of members of the class?</p> <p>14:21:55 24 A. We have the transaction records of everybody</p> <p>14:21:57 25 in the class, and all we would do is take a sample of</p> |
| <p style="text-align: right;">195</p> <p>14:19:43 1 what percentage of titles were impacted?</p> <p>14:19:45 2 MR. FRIEDMAN: Objection, form.</p> <p>14:19:46 3 THE WITNESS: No, I don't know what</p> <p>14:19:47 4 percentage were, but I'm saying the hypothesis you</p> <p>14:19:52 5 put forth would not be -- that wouldn't be a good</p> <p>14:19:55 6 estimate.</p> <p>14:19:56 7 Q. MR. SWANSON: You don't think it's as low as</p> <p>14:19:59 8 40 percent?</p> <p>14:19:59 9 A. Well, 40 percent, as I understand it, was the</p> <p>14:20:04 10 number that you thought the damages would be negative</p> <p>14:20:07 11 when in fact they were calculated as positive, and I</p> <p>14:20:10 12 don't think it would be that high. All right?</p> <p>14:20:13 13 Wasn't 40 percent that I had incorrectly</p> <p>14:20:16 14 identified as having positive damages?</p> <p>14:20:18 15 Q. We may be talking past each other here.</p> <p>14:20:21 16 A. Okay.</p> <p>14:20:22 17 Q. I'm sure it's my fault. My question for you</p> <p>14:20:25 18 is you have a 99.5 percent of affected sales figure</p> <p>14:20:30 19 that you've been reporting --</p> <p>14:20:32 20 A. Yes.</p> <p>14:20:32 21 Q. -- in your report. And my question was is it</p> <p>14:20:35 22 consistent with that number that you've reported that</p> <p>14:20:41 23 at the same time perhaps only as low as 40 percent of</p> <p>14:20:44 24 the publisher defendant titles were positively</p> <p>14:20:49 25 impacted?</p>                                                                                    | <p style="text-align: right;">197</p> <p>14:22:02 1 transactions records and predict the prices of</p> <p>14:22:05 2 everything on that list, compare it with the actual</p> <p>14:22:08 3 price in the transactions records and see how many of</p> <p>14:22:10 4 them are positive.</p> <p>14:22:11 5 Q. But you didn't do that.</p> <p>14:22:13 6 A. I haven't done that, no. I've given</p> <p>14:22:16 7 illustrations of how you do the calculation, but I</p> <p>14:22:20 8 haven't attempted to calculate for all transactions</p> <p>14:22:25 9 for a sample of class members.</p> <p>14:22:27 10 Q. Could you turn to page 12 of your expert</p> <p>14:22:31 11 report? And I wanted to ask you about something in</p> <p>14:22:38 12 the first paragraph. Actually, toward the end of the</p> <p>14:22:42 13 first paragraph you're talking about a wealth</p> <p>14:22:46 14 transfer and at the end you say:</p> <p>14:22:47 15 "The wealth transfer is the sum over all</p> <p>14:22:51 16 e-book titles and all days for which the</p> <p>14:22:53 17 collusive agency model was in place, but the</p> <p>14:22:55 18 quantity sold multiplied by the elevation in</p> <p>14:22:57 19 price on that day is the collusive agency</p> <p>14:22:59 20 model."</p> <p>14:23:01 21 What are you referring to there?</p> <p>14:23:02 22 A. I'm trying to figure out why it isn't clear.</p> <p>14:23:13 23 For any given e-book title, we have a number of</p> <p>14:23:15 24 transactions and we just sum the difference between</p> <p>14:23:19 25 the actual price and the but-for price for every</p>          |

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| <p style="text-align: right;">206</p> <p>14:34:23 1 other extraneous information and calculate the</p> <p>14:34:27 2 equilibrium markup before and after the</p> <p>14:34:28 3 anticompetitive conduct.</p> <p>14:34:29 4 That doesn't require the use of econometrics</p> <p>14:34:32 5 except insofar as you need it to produce numbers that</p> <p>14:34:36 6 are the parameters of the model.</p> <p>14:34:38 7 In this case, I don't know how I would do</p> <p>14:34:42 8 that without information about the but-for price. I</p> <p>14:34:44 9 mean, I don't get yet how I would do that without</p> <p>14:34:48 10 information about the but-for price.</p> <p>14:34:51 11 But that modeling exercise of creating a</p> <p>14:34:54 12 theoretical model of imperfect competition has been</p> <p>14:34:59 13 used on occasion. I've seen it used maybe twice, but</p> <p>14:35:03 14 as you can well imagine, an economist who does that</p> <p>14:35:05 15 is in deep trouble because he's got to defend a</p> <p>14:35:09 16 particular model of imperfect competition, and we can</p> <p>14:35:13 17 think of about a hundred alternatives to any model</p> <p>14:35:20 18 you want to come up with. So all you're going --</p> <p>14:35:21 19 both sides are just going to be paying a lot of money</p> <p>14:35:25 20 to economists if you take that approach.</p> <p>14:35:27 21 <b>Q. We can't have that. It's been done.</b></p> <p>14:35:30 22 <b>Is it -- do you have any empirical view on</b></p> <p>14:35:39 23 <b>whether two different customers normally pay the same</b></p> <p>14:35:43 24 <b>price for the same e-book at the same retailer on the</b></p> <p>14:35:47 25 <b>same day, focusing on the class period?</b></p> | <p style="text-align: right;">208</p> <p>14:36:55 1 But I haven't attempted -- I don't know of</p> <p>14:36:59 2 any independent source of information about coupons.</p> <p>14:37:02 3 <b>Q. Professor, if an individual consumer received</b></p> <p>14:37:07 4 <b>benefits that he or she would not have received in</b></p> <p>14:37:11 5 <b>the but-for world, how do you treat those benefits in</b></p> <p>14:37:14 6 <b>your damage calculation?</b></p> <p>14:37:15 7 MR. FRIEDMAN: Objection, form.</p> <p>14:37:16 8 THE WITNESS: Since I don't know what you</p> <p>14:37:17 9 mean by benefits, I can't answer the question. I</p> <p>14:37:20 10 don't know what you're even talking about.</p> <p>14:37:21 11 <b>Q. MR. SWANSON: Well, if -- speaking generally</b></p> <p>14:37:26 12 <b>of damage calculation, if a challenged conduct gives</b></p> <p>14:37:29 13 <b>rise to both harm and benefits, when you quantify</b></p> <p>14:37:33 14 <b>damages as a damage expert, do you take account in</b></p> <p>14:37:38 15 <b>any way of the benefits?</b></p> <p>14:37:40 16 MR. FRIEDMAN: Objection, form.</p> <p>14:37:41 17 THE WITNESS: It depends on the circumstances</p> <p>14:37:44 18 where the benefits accrued, but in general in this</p> <p>14:37:47 19 case I relied upon the opinion of the Court that</p> <p>14:37:50 20 there were no pro-competitive benefits. So, of</p> <p>14:37:53 21 course, I'm not taking into account things that the</p> <p>14:37:56 22 Court has said don't exist.</p> <p>14:37:57 23 <b>Q. MR. SWANSON: If your interpretation or</b></p> <p>14:38:01 24 <b>counsel's interpretation of the significance of</b></p> <p>14:38:04 25 <b>whatever court findings that you're pointing to is</b></p> |
| <p style="text-align: right;">207</p> <p>14:35:50 1 MR. FRIEDMAN: Objection, form, asked and</p> <p>14:35:51 2 answered.</p> <p>14:35:51 3 THE WITNESS: I haven't studied that problem,</p> <p>14:35:53 4 and I have no opinion about it based on anything I've</p> <p>14:35:56 5 done in this case.</p> <p>14:35:57 6 <b>Q. MR. SWANSON: Do some consumers use coupons</b></p> <p>14:36:02 7 <b>or have discounts or rebates on their e-book</b></p> <p>14:36:05 8 <b>purchases?</b></p> <p>14:36:06 9 MR. FRIEDMAN: Objection, form, asked and</p> <p>14:36:07 10 answered.</p> <p>14:36:07 11 THE WITNESS: That sounds like a statement,</p> <p>14:36:09 12 not a question.</p> <p>14:36:10 13 <b>Q. MR. SWANSON: No, it's a question. It's a</b></p> <p>14:36:15 14 <b>question I hope you know the answer to.</b></p> <p>14:36:17 15 A. Do some people -- I know that Amazon does in</p> <p>14:36:20 16 fact have coupons. The extent to which they use them</p> <p>14:36:23 17 for e-books I don't know and I haven't studied and</p> <p>14:36:26 18 it's not part of my opinion in this case.</p> <p>14:36:29 19 <b>Q. Do you have the data that allow you to adjust</b></p> <p>14:36:34 20 <b>the Amazon prices for any coupons or discounts or</b></p> <p>14:36:38 21 <b>rebates that were provided on any of the --</b></p> <p>14:36:42 22 A. If it's -- if it's in the transactions</p> <p>14:36:45 23 prices, it's there in part of the average. Yes. I</p> <p>14:36:49 24 mean, the average is the actual average of the actual</p> <p>14:36:52 25 transaction prices. So it's in there.</p>                                                                                                                                                | <p style="text-align: right;">209</p> <p>14:38:07 1 <b>incorrect and the issue is presented to a jury for</b></p> <p>14:38:10 2 <b>decision and the jury finds there were</b></p> <p>14:38:12 3 <b>pro-competitive benefits, how do you handle those as</b></p> <p>14:38:15 4 <b>a damage expert?</b></p> <p>14:38:16 5 MR. FRIEDMAN: Objection, form.</p> <p>14:38:18 6 THE WITNESS: Well, if this were a case in</p> <p>14:38:21 7 which pro-competitive benefits were found to exist,</p> <p>14:38:24 8 then you would have to attempt to include them in the</p> <p>14:38:26 9 model of damages to the extent they occurred to the</p> <p>14:38:29 10 same people who were damaged by the conspiracy.</p> <p>14:38:31 11 <b>Q. MR. SWANSON: And would you calculate net</b></p> <p>14:38:36 12 <b>damages, in other words, net of pro-competitive</b></p> <p>14:38:40 13 <b>benefits?</b></p> <p>14:38:40 14 MR. FRIEDMAN: Objection, form.</p> <p>14:38:42 15 THE WITNESS: As an economist, I don't think</p> <p>14:38:43 16 I'm entitled to an opinion about a legal conclusion</p> <p>14:38:46 17 about which benefits should be counted as offsetting</p> <p>14:38:49 18 versus not. I would do whatever I was told in terms</p> <p>14:38:52 19 of the legal opinion because it's not up to me. I</p> <p>14:38:56 20 mean, it's not up to me to make that judgment about</p> <p>14:39:02 21 the -- what the pro-competitive benefits are and</p> <p>14:39:05 22 which ones are offset against damages.</p> <p>14:39:11 23 MR. SWANSON: I'm going to move to on</p> <p>14:39:15 24 Exhibit 5, which is three pages.</p> <p>14:39:33 25 ///</p>                                                                                                            |



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| <p style="text-align: right;">214</p> <p>14:45:22 1 have entered into settlement agreements with</p> <p>14:45:25 2 plaintiffs that provide for monetary payments to</p> <p>14:45:30 3 certain consumers who purchased their e-books between</p> <p>14:45:35 4 April 1st, 2010, and May 21st, 2012?</p> <p>14:45:37 5 MR. FRIEDMAN: Objection, form.</p> <p>14:45:39 6 THE WITNESS: I'm aware of the existence of</p> <p>14:45:41 7 the settlement agreement. I do not know the details</p> <p>14:45:44 8 of the settlement agreement.</p> <p>14:45:46 9 Q. MR. SWANSON: Let's go back actually to the</p> <p>14:45:48 10 hypothetical -- third hypothetical we were just</p> <p>14:45:52 11 talking about, the consumer who buys two books and</p> <p>14:45:55 12 only two books.</p> <p>14:45:59 13 If that consumer has received a settlement</p> <p>14:46:05 14 payment in this litigation of \$3, do you calculate</p> <p>14:46:12 15 any damages for purposes of the upcoming damage</p> <p>14:46:16 16 trial?</p> <p>14:46:16 17 MR. FRIEDMAN: Objection, form.</p> <p>14:46:17 18 THE WITNESS: Since I don't know anything</p> <p>14:46:19 19 about how much anybody's received in settlement</p> <p>14:46:23 20 payments, any consumer's received, I can't possibly</p> <p>14:46:26 21 account for that in the model. I don't know how much</p> <p>14:46:28 22 anybody's received in settlements because I don't</p> <p>14:46:31 23 know the details.</p> <p>14:46:32 24 Q. MR. SWANSON: I ask you to turn to page 4 of</p> <p>14:46:42 25 your report. Now, you indicated in the paragraph</p> | <p style="text-align: right;">216</p> <p>14:48:13 1 class members were harmed by paying higher prices for</p> <p>14:48:17 2 e-books than they would have paid absent the agency</p> <p>14:48:20 3 agreements?</p> <p>14:48:20 4 A. The existence of higher prices for all</p> <p>14:48:25 5 e-books harm all class members, yes, but it doesn't</p> <p>14:48:30 6 mean they actually -- it could -- the mechanism by</p> <p>14:48:34 7 which that's true isn't necessarily just the</p> <p>14:48:36 8 purchases. It's also the dead-weight loss and also</p> <p>14:48:42 9 the other effects that arose from this.</p> <p>14:48:44 10 Q. So there are class members -- withdraw that.</p> <p>14:48:48 11 You entertain the possibility that there are</p> <p>14:48:51 12 class members who paid no overcharges but who</p> <p>14:48:55 13 experienced dead-weight loss?</p> <p>14:48:56 14 A. Well, I don't anticipate there are such</p> <p>14:49:00 15 people, but I'm saying if somebody was excluded from</p> <p>14:49:03 16 the market because all the books they bought went up</p> <p>14:49:06 17 in price by 20 or 30 percent, then indeed they would</p> <p>14:49:10 18 have suffered loss, although they wouldn't</p> <p>14:49:13 19 necessarily have made any transactions.</p> <p>14:49:15 20 I'm not talking about do I know who those</p> <p>14:49:18 21 customers are. I don't. But I'm saying damage is</p> <p>14:49:22 22 not restricted to overcharges on e-books. Or I</p> <p>14:49:25 23 shouldn't say -- damage is restricted to that.</p> <p>14:49:28 24 Anticompetitive injury is not restricted to damages.</p> <p>14:49:33 25 Q. Your model does not show that the price of</p> |
| <p style="text-align: right;">215</p> <p>14:46:57 1 under Assignment in the second sentence here, I</p> <p>14:47:03 2 think, that: "Attorneys for class plaintiffs also</p> <p>14:47:06 3 have asked me to determine whether anticompetitive</p> <p>14:47:09 4 harm arising from the conspiracy can be demonstrated</p> <p>14:47:12 5 for all class members."</p> <p>14:47:14 6 Do you see that?</p> <p>14:47:14 7 A. Yes.</p> <p>14:47:16 8 Q. Does that really mean all, as in a hundred</p> <p>14:47:21 9 percent?</p> <p>14:47:22 10 A. It means for the group of class members you</p> <p>14:47:26 11 can demonstrate the injury that accrued to each one,</p> <p>14:47:31 12 each of them, yes. So you can -- you can talk about</p> <p>14:47:34 13 the class itself being affected on a classwide basis</p> <p>14:47:41 14 by anticompetitive harm.</p> <p>14:47:42 15 Q. And for a class to be affected classwide by</p> <p>14:47:47 16 anticompetitive harm, what percentage of members of</p> <p>14:47:49 17 that class must be individually injured?</p> <p>14:47:52 18 MR. FRIEDMAN: Objection, form, calls for</p> <p>14:47:54 19 legal conclusion.</p> <p>14:47:55 20 THE WITNESS: I have no opinion on that.</p> <p>14:47:57 21 It's not -- not my task to characterize that issue.</p> <p>14:48:03 22 My task is to -- what's the mechanism for determining</p> <p>14:48:06 23 whether class members were injured on a classwide</p> <p>14:48:11 24 basis.</p> <p>14:48:11 25 Q. MR. SWANSON: Is it your testimony that all</p>                                                         | <p style="text-align: right;">217</p> <p>14:49:39 1 each e-book that a proposed class member purchased</p> <p>14:49:41 2 from a publisher defendant was elevated by the</p> <p>14:49:44 3 conspiracy.</p> <p>14:49:45 4 A. No.</p> <p>14:49:46 5 Q. Now, you find that there were reductions in</p> <p>14:49:51 6 prices for a half percent of e-books. That's what</p> <p>14:49:55 7 you say, right?</p> <p>14:49:57 8 A. Half, yeah. Half of a percent of the</p> <p>14:49:59 9 transactions are accounted for by categories in which</p> <p>14:50:02 10 the predicted price is above the actual price.</p> <p>14:50:05 11 Q. And there were no damages associated with</p> <p>14:50:08 12 those categories of purchases?</p> <p>14:50:11 13 MR. FRIEDMAN: Objection, form.</p> <p>14:50:12 14 THE WITNESS: Well, I calculated what the</p> <p>14:50:14 15 negative amount was, and whether you want to call</p> <p>14:50:17 16 that negative damages or nothing is up to you.</p> <p>14:50:20 17 Q. MR. SWANSON: You don't subtract those price</p> <p>14:50:22 18 reductions from your damage calculations, correct?</p> <p>14:50:24 19 A. No, but they're there. If you want to do the</p> <p>14:50:32 20 subtraction, it's easy.</p> <p>14:50:33 21 Q. What, if anything, do you know about consumer</p> <p>14:50:35 22 e-book purchasing patterns?</p> <p>14:50:38 23 MR. FRIEDMAN: Object to form.</p> <p>14:50:39 24 THE WITNESS: I haven't studied consumer</p> <p>14:50:41 25 e-book purchasing patterns, so I have no opinion</p>                                                                                                                                                            |

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| <p>218</p> <p>14:50:42 1 about that.</p> <p>14:50:42 2 <b>Q. MR. SWANSON: Do you know whether an</b></p> <p>14:50:45 3 <b>individual class member engaged in one e-book</b></p> <p>14:50:46 4 <b>transaction or 20?</b></p> <p>14:50:46 5 A. Well, I can tell it from the transaction</p> <p>14:50:49 6 records, yes, but I have not examined the</p> <p>14:50:51 7 distribution of e-books purchases across customers,</p> <p>14:50:54 8 no. I've done no analysis of that.</p> <p>14:50:56 9 <b>Q. And how from the transaction record can you</b></p> <p>14:50:58 10 <b>tell if a class member purchased 20 as opposed to one</b></p> <p>14:51:02 11 <b>e-book?</b></p> <p>14:51:02 12 A. You can follow that customer's transaction</p> <p>14:51:04 13 records through time for a given period. You can't</p> <p>14:51:04 14 sum them across retailers because you don't know how</p> <p>14:51:14 15 to match -- if somebody is buying from multiple</p> <p>14:51:17 16 e-retailers, I don't know of a way to match across</p> <p>14:51:21 17 them, but certainly it would be possible for Amazon</p> <p>14:51:23 18 to give you a printout of all the e-books that a</p> <p>14:51:28 19 given customer bought from Amazon, similarly Apple</p> <p>14:51:31 20 and similarly Barnes &amp; Noble.</p> <p>14:51:34 21 <b>Q. But do you have that now?</b></p> <p>14:51:35 22 A. Well, I don't have it now in that form, but I</p> <p>14:51:43 23 could easy produce it, I believe, from the</p> <p>14:51:47 24 transactions data. Maybe I couldn't. Maybe I'd have</p> <p>14:51:54 25 to ask Amazon for it. I'm not absolutely certain,</p> | <p>220</p> <p>14:52:59 1 and have them calculate for each customer or for a</p> <p>14:53:03 2 given customer have them print out all e-books that</p> <p>14:53:07 3 that customer has bought. That would be the way to</p> <p>14:53:09 4 get that information.</p> <p>14:53:10 5 <b>Q. Do you have any understanding as to the</b></p> <p>14:53:12 6 <b>percentage of consumers who purchased only one e-book</b></p> <p>14:53:16 7 <b>during the damage period?</b></p> <p>14:53:18 8 A. I do not know how many. Obviously if I can't</p> <p>14:53:22 9 identify whether two different transactions are two</p> <p>14:53:27 10 different customers or the same customer, then I</p> <p>14:53:29 11 obviously can't tell how many people bought exactly</p> <p>14:53:33 12 one.</p> <p>14:53:33 13 <b>Q. So you don't know if it's more or less than</b></p> <p>14:53:36 14 <b>50 percent?</b></p> <p>14:53:36 15 A. I do not know how many people bought</p> <p>14:53:40 16 precisely one e-book in their history.</p> <p>14:53:44 17 <b>Q. Would it surprise you to learn that it could</b></p> <p>14:53:47 18 <b>be 30 or 40 percent?</b></p> <p>14:53:48 19 A. I have no expectations about what the number</p> <p>14:53:53 20 is. So in a certain sense, every number you might</p> <p>14:53:57 21 throw at me would be a surprise because I don't know</p> <p>14:53:59 22 what it is.</p> <p>14:54:00 23 <b>Q. Well, 101 percent would be a big surprise, I</b></p> <p>14:54:05 24 <b>think.</b></p> <p>14:54:05 25 A. Not coming from you. Yes, I would expect it</p> |
| <p>219</p> <p>14:51:57 1 but I thought we could probably do it from the</p> <p>14:52:00 2 transactions records.</p> <p>14:52:01 3 <b>Q. So your -- your understanding is that there</b></p> <p>14:52:05 4 <b>are customer identifiers in the data that have been</b></p> <p>14:52:07 5 <b>produced in this case?</b></p> <p>14:52:08 6 A. I'm not certain that that's true. I</p> <p>14:52:10 7 thought -- I think there might be, but I'm not</p> <p>14:52:12 8 absolutely certain and I don't want to trust my</p> <p>14:52:15 9 memory. So maybe, maybe not.</p> <p>14:52:17 10 <b>Q. If there are no customer identifiers, then it</b></p> <p>14:52:25 11 <b>would be the case that you wouldn't be able to tell</b></p> <p>14:52:27 12 <b>if an e-book consumer bought one or a hundred</b></p> <p>14:52:33 13 <b>e-books?</b></p> <p>14:52:34 14 MR. FRIEDMAN: Just for clarification, that</p> <p>14:52:36 15 there is no customer identifiers that have been</p> <p>14:52:38 16 produced in the litigation, is that your question?</p> <p>14:52:40 17 MR. SWANSON: Right.</p> <p>14:52:41 18 MR. FRIEDMAN: As opposed to that exist in</p> <p>14:52:43 19 the world?</p> <p>14:52:43 20 MR. SWANSON: Yeah, absolutely.</p> <p>14:52:45 21 <b>Q. Do you understand the distinction?</b></p> <p>14:52:46 22 A. I understand the distinction. I know the</p> <p>14:52:50 23 customer identifiers exist in the real world. It's</p> <p>14:52:52 24 conceivable that the only way you could get at this</p> <p>14:52:56 25 would be to give the regression equation to Amazon</p>                                                          | <p>221</p> <p>14:54:11 1 to be between zero and a hundred.</p> <p>14:54:14 2 <b>Q. You've clearly been talking to Dale Jorgensen</b></p> <p>14:54:20 3 <b>about my abilities.</b></p> <p>14:54:23 4 <b>Do you have any individual transactional</b></p> <p>14:54:33 5 <b>e-book purchase data from the named -- either</b></p> <p>14:54:37 6 <b>currently or former named class representatives?</b></p> <p>14:54:40 7 A. I personally do not have in my possession.</p> <p>14:54:44 8 MR. FRIEDMAN: All right. Go ahead. That's</p> <p>14:54:46 9 fine.</p> <p>14:54:46 10 THE WITNESS: I personally at this moment do</p> <p>14:54:49 11 not have in my possession any transactions records</p> <p>14:54:52 12 for any named plaintiff.</p> <p>14:54:53 13 <b>Q. MR. SWANSON: Were -- are you saying that</b></p> <p>14:54:56 14 <b>none were made available to you?</b></p> <p>14:54:57 15 MR. FRIEDMAN: I'm not going to allow him to</p> <p>14:54:59 16 answer that. Next question.</p> <p>14:55:01 17 MR. SWANSON: Why?</p> <p>14:55:02 18 MR. FRIEDMAN: I think that violates -- I</p> <p>14:55:04 19 think it violates what information was communicated</p> <p>14:55:10 20 to Dr. Noll from counsel.</p> <p>14:55:12 21 MR. SWANSON: I think you're suggesting I'm</p> <p>14:55:16 22 asking a question I'm not asking.</p> <p>14:55:19 23 MR. FRIEDMAN: Then I don't understand your</p> <p>14:55:20 24 question. You could ask him if he relied on it.</p> <p>14:55:25 25 He's already said he didn't have them available or he</p>                               |



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| <p style="text-align: right;">226</p> <p>15:18:10 1 A. I was aware that reports on that issue had</p> <p>15:18:15 2 been submitted, but I wouldn't have been able to give</p> <p>15:18:18 3 you his name had you asked me for it.</p> <p>15:18:20 4 <b>Q. Are you familiar with Professor Wickelgren's</b></p> <p>15:18:26 5 <b>work as an economist?</b></p> <p>15:18:27 6 A. No.</p> <p>15:18:27 7 <b>Q. Have you heard of him before in the academic</b></p> <p>15:18:30 8 <b>context?</b></p> <p>15:18:31 9 A. No.</p> <p>15:18:32 10 <b>Q. I take it you have no insight as to whether</b></p> <p>15:18:36 11 <b>he's an expert on anything?</b></p> <p>15:18:44 12 A. I'm sure he's a fine fellow and kind to his</p> <p>15:18:49 13 mother. Okay? I don't know him. So I can't really</p> <p>15:18:55 14 say anything one way or the other about them.</p> <p>15:18:58 15 <b>Q. That means you haven't read any of his</b></p> <p>15:19:01 16 <b>billion academic papers.</b></p> <p>15:19:04 17 A. Regardless. Not even his guffaws. I'm not</p> <p>15:19:08 18 familiar with the name. That doesn't mean that if I</p> <p>15:19:11 19 looked at his CV I wouldn't recognize something. It</p> <p>15:19:13 20 just means that I don't know. What is there about I</p> <p>15:19:17 21 don't know --</p> <p>15:19:18 22 <b>Q. You can only do that once. It loses its</b></p> <p>15:19:31 23 <b>force.</b></p> <p>15:19:32 24 <b>So you have no knowledge as to whether or not</b></p> <p>15:19:44 25 <b>Professor Wickelgren has developed a reliable basis</b></p>                             | <p style="text-align: right;">228</p> <p>15:21:14 1 <b>damages, would that lead you to be more concerned</b></p> <p>15:21:19 2 <b>about your own methodology at all?</b></p> <p>15:21:23 3 MR. FRIEDMAN: I'm going to object and I also</p> <p>15:21:24 4 don't think, Dan, in fairness, that that's an</p> <p>15:21:26 5 accurate representation and a fair one, given the</p> <p>15:21:30 6 fact that the doctor has not looked at it and I don't</p> <p>15:21:35 7 think it's accurate.</p> <p>15:21:36 8 So if you're representing that Dr. Wickelgren</p> <p>15:21:39 9 was doing the exact same thing for the exact same</p> <p>15:21:43 10 purposes, which was the implication of question, I</p> <p>15:21:47 11 think that's misleading. And I don't think you</p> <p>15:21:49 12 intended to, but I just don't think that's a fair</p> <p>15:21:53 13 presentation to Roger. Excuse me. To Dr. Noll.</p> <p>15:21:56 14 THE WITNESS: I forgot the question.</p> <p>15:21:57 15 <b>Q. MR. SWANSON: Well, my question is as an</b></p> <p>15:21:59 16 <b>economist, if you learned that another economist had</b></p> <p>15:22:04 17 <b>looked at the same issue that you had and had come up</b></p> <p>15:22:07 18 <b>with a conclusion that was 40 percent off of the</b></p> <p>15:22:14 19 <b>number that represented your own conclusion, would</b></p> <p>15:22:17 20 <b>that give you any pause, leading you to reconsider</b></p> <p>15:22:20 21 <b>your own methodology?</b></p> <p>15:22:22 22 MR. FRIEDMAN: Objection, form.</p> <p>15:22:24 23 THE WITNESS: Only if they had done exactly</p> <p>15:22:25 24 the same thing in exactly the same context. I mean,</p> <p>15:22:29 25 how could they possibly have done the same thing a</p> |
| <p style="text-align: right;">227</p> <p>15:19:47 1 <b>for estimating damages in this case.</b></p> <p>15:19:51 2 A. No.</p> <p>15:19:51 3 <b>Q. And you're not the least bit curious about</b></p> <p>15:19:55 4 <b>what he's done?</b></p> <p>15:19:56 5 MR. FRIEDMAN: Objection, form.</p> <p>15:19:57 6 <b>THE WITNESS: Yeah, I don't know -- no, I'm</b></p> <p>15:20:08 7 <b>not curious, no. Curious is the wrong word.</b></p> <p>15:20:16 8 MR. FRIEDMAN: I think you've answered the</p> <p>15:20:18 9 question.</p> <p>15:20:19 10 THE WITNESS: I don't have any great desire</p> <p>15:20:25 11 to study his work, no.</p> <p>15:20:26 12 <b>Q. MR. SWANSON: And if -- if I represent to you</b></p> <p>15:20:28 13 <b>that there is a 40 percent difference in the</b></p> <p>15:20:33 14 <b>calculated damages, that doesn't stimulate you to</b></p> <p>15:20:37 15 <b>look further into his work?</b></p> <p>15:20:39 16 MR. FRIEDMAN: Objection, form.</p> <p>15:20:41 17 THE WITNESS: I mean, if someone asked me to</p> <p>15:20:49 18 undertake a study of his report to figure out why he</p> <p>15:20:53 19 got the number he did, I would do that. But I have</p> <p>15:20:57 20 not been asked to do it and I don't have any great</p> <p>15:21:00 21 desire to do it. But if somebody asked me to do it,</p> <p>15:21:04 22 I'd do it.</p> <p>15:21:06 23 <b>Q. MR. SWANSON: If you were told that another</b></p> <p>15:21:08 24 <b>economist had studied the same issues that you had</b></p> <p>15:21:11 25 <b>and had come up with a wildly different estimate of</b></p> | <p style="text-align: right;">229</p> <p>15:22:32 1 year before the opinion was offered? All right? I</p> <p>15:22:37 2 mean, I'm relying upon the outcome of the liability</p> <p>15:22:40 3 phase. He's not.</p> <p>15:22:44 4 So he's in a -- he's in a state of much</p> <p>15:22:47 5 different information than I am. So it would be</p> <p>15:22:49 6 irrelevant what he did at that state of information.</p> <p>15:22:51 7 <b>Q. MR. SWANSON: As an academic economist, when</b></p> <p>15:22:57 8 <b>you work in a particular area and form opinions or</b></p> <p>15:23:01 9 <b>theories, do you normally canvass the work of other</b></p> <p>15:23:05 10 <b>economists in the area first?</b></p> <p>15:23:07 11 MR. FRIEDMAN: Objection, form.</p> <p>15:23:08 12 <b>THE WITNESS: In peer reviewed journals, yes.</b></p> <p>15:23:10 13 <b>In expert reports in antitrust cases, no. I don't</b></p> <p>15:23:14 14 <b>read people's antitrust declarations to inform my</b></p> <p>15:23:17 15 <b>research that I'm going to try to publish in an</b></p> <p>15:23:20 16 <b>economics journal.</b></p> <p>15:23:21 17 <b>Q. MR. SWANSON: If Dr. Wickelgren was an</b></p> <p>15:23:30 18 <b>economist whose work you were familiar with, would</b></p> <p>15:23:33 19 <b>that make you more likely to review the work on</b></p> <p>15:23:36 20 <b>damages he's done in this case?</b></p> <p>15:23:37 21 MR. FRIEDMAN: Objection, form.</p> <p>15:23:39 22 THE WITNESS: My lack of interest in what he</p> <p>15:23:42 23 has to do is not with respect to his name. It's with</p> <p>15:23:45 24 respect to the timing and circumstances, that what</p> <p>15:23:50 25 happened then before the record was developed in the</p>              |

| 230      |                                                                 | 232      |                                                                 |
|----------|-----------------------------------------------------------------|----------|-----------------------------------------------------------------|
| 15:23:53 | 1 liability phase of this case has no natural                   | 15:26:57 | 1 THE WITNESS: I think it's also in the main                    |
| 15:23:58 | 2 relationship to what I did.                                   | 15:26:59 | 2 body.                                                         |
| 15:23:59 | 3 <b>Q. MR. SWANSON: Can you take a look at</b>                 | 15:27:01 | 3 <b>Q. MR. SWANSON: Yeah, I think it's in both</b>             |
| 15:24:00 | 4 <b>Exhibit 7, what would be the second page. Do you</b>       | 15:27:03 | 4 <b>places, but if you can find it at the end, that's</b>      |
| 15:24:05 | 5 <b>note the date of Professor Wickelgren's declaration?</b>   | 15:27:06 | 5 <b>great.</b>                                                 |
| 15:24:12 | 6 A. Well, the first one I noticed was August of                | 15:27:06 | 6 A. Subtotal for unidentified foreign is                       |
| 15:24:14 | 7 2012. I don't know when this one is.                          | 15:27:09 | 7 6.3 percent.                                                  |
| 15:24:20 | 8 <b>Q. Just the second page. This would be --</b>              | 15:27:11 | 8 <b>Q. And what -- what dollar amount does that</b>            |
| 15:24:23 | 9 A. Okay. So this one in June. This is prior to                | 15:27:13 | 9 <b>correspond with?</b>                                       |
| 15:24:26 | 10 the issuance of the opinion.                                 | 15:27:14 | 10 A. 19.5 million.                                             |
| 15:24:27 | 11 <b>Q. So your -- your view is that Dr. Wickelgren's</b>      | 15:27:19 | 11 <b>Q. And you're looking at the second page of</b>           |
| 15:24:32 | 12 <b>work is necessarily irrelevant because it didn't rely</b> | 15:27:25 | 12 <b>Exhibit 3 to your report which is Deposition</b>          |
| 15:24:38 | 13 <b>on the Court's opinion?</b>                               | 15:27:29 | 13 <b>Exhibit 1, correct?</b>                                   |
| 15:24:40 | 14 MR. FRIEDMAN: Objection, form.                               | 15:27:32 | 14 A. Correct.                                                  |
| 15:24:41 | 15 THE WITNESS: No, I didn't say it was                         | 15:27:33 | 15 <b>Q. And that 19.5 million is the figure on this</b>        |
| 15:24:43 | 16 irrelevant. I don't know for sure that it's                  | 15:27:43 | 16 <b>Exhibit 3 to your report that is associated with</b>      |
| 15:24:45 | 17 irrelevant. You asked me if I had a burning desire           | 15:27:48 | 17 <b>subtotal for unidentified, right?</b>                     |
| 15:24:49 | 18 to read his reports, and I don't. If there's                 | 15:27:50 | 18 A. Yes.                                                      |
| 15:24:54 | 19 something in them that is directly comparable to what        | 15:27:51 | 19 <b>Q. But those are identified as being not U.S.</b>         |
| 15:24:57 | 20 I did, then obviously I should read it, but I'm not          | 15:27:59 | 20 <b>purchasers?</b>                                           |
| 15:25:02 | 21 aware of that being true. I don't know that it's             | 15:28:00 | 21 A. Yes.                                                      |
| 15:25:05 | 22 true, and so I can't answer questions about it; and          | 15:28:01 | 22 <b>Q. And excluded territories? What does that</b>           |
| 15:25:13 | 23 I'm not going to bill some client for reading                | 15:28:08 | 23 <b>refer to?</b>                                             |
| 15:25:16 | 24 something that's irrelevant if it isn't and so -- and        | 15:28:08 | 24 A. That refers to -- and they're listed in the               |
| 15:25:21 | 25 I would certainly not read it outside of the context         | 15:28:16 | 25 report -- I can't remember them by name, three               |
| 231      |                                                                 | 233      |                                                                 |
| 15:25:23 | 1 of litigation.                                                | 15:28:19 | 1 territories that are not listed in the state                  |
| 15:25:24 | 2 So I just don't see a point here. But if it                   | 15:28:21 | 2 complaint and not members of the class.                       |
| 15:25:28 | 3 is -- if it is a valid damages model, I'm sure I'm            | 15:28:23 | 3 <b>Q. And then the subtotal for the plaintiff</b>             |
| 15:25:31 | 4 going to see it in your expert reports and then I'll          | 15:28:26 | 4 <b>states, that's a number of about 170.6 million; is</b>     |
| 15:25:35 | 5 have an opportunity to reply to it. The best expert           | 15:28:32 | 5 <b>that correct?</b>                                          |
| 15:25:40 | 6 reports for me to deal with are going to be the ones          | 15:28:32 | 6 A. Yes.                                                       |
| 15:25:44 | 7 that you produce, not the ones that were produced for         | 15:28:32 | 7 <b>Q. And that corresponds to what?</b>                       |
| 15:25:46 | 8 settlement in something else months ago.                      | 15:28:34 | 8 A. That corresponds to the 55.4 percent of sales              |
| 15:25:50 | 9 <b>Q. MR. SWANSON: Let me -- you can put those to</b>         | 15:28:44 | 9 that are accounted for by those states, the damages           |
| 15:25:57 | 10 <b>one side. I ask you, you have a category of damage</b>    | 15:28:48 | 10 associated with those sales.                                 |
| 15:26:09 | 11 <b>quantification that includes consumers with foreign</b>   | 15:28:50 | 11 <b>Q. And the subtotal for class states, that's</b>          |
| 15:26:12 | 12 <b>addresses who are not members of the military.</b>        | 15:28:56 | 12 <b>116.7 million?</b>                                        |
| 15:26:15 | 13 A. Yes.                                                      | 15:28:57 | 13 A. Yeah, that's the same -- this is the other                |
| 15:26:16 | 14 <b>Q. And can you tell me what percentage of your</b>        | 15:29:00 | 14 states that are not represented in the state                 |
| 15:26:23 | 15 <b>overall damage calculation that those -- or that</b>      | 15:29:02 | 15 complaint. Class members live in those states.               |
| 15:26:28 | 16 <b>group represents?</b>                                     | 15:29:08 | 16 <b>Q. And in each instance, either the subtotal for</b>      |
| 15:26:29 | 17 A. It's in the report and I haven't memorized                | 15:29:11 | 17 <b>plaintiff states or the subtotal for class states,</b>    |
| 15:26:32 | 18 the number. My recollection is a few percent, but I          | 15:29:15 | 18 <b>that is your best opinion as to what the total damage</b> |
| 15:26:35 | 19 don't remember the exact number.                             | 15:29:18 | 19 <b>was to consumers in those respective categories?</b>      |
| 15:26:35 | 20 <b>Q. It's in your report. Could you just find it</b>        | 15:29:23 | 20 A. Yes, that's my estimate of damages in those               |
| 15:26:39 | 21 <b>for us? That would be Deposition Exhibit 1.</b>           | 15:29:25 | 21 categories of states.                                        |
| 15:26:50 | 22 A. I don't remember where it is.                             | 15:29:26 | 22 <b>Q. Do you have any margin of error that attaches</b>      |
| 15:26:52 | 23 MR. HUBBARD: The very last.                                  | 15:29:29 | 23 <b>to your estimates of either of those numbers?</b>         |
| 15:26:53 | 24 THE WITNESS: Of the exhibits?                                | 15:29:32 | 24 A. No, I do not.                                             |
| 15:26:56 | 25 MR. HUBBARD: Yes.                                            | 15:29:38 | 25 <b>Q. When in your report you were addressing the</b>        |

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| 15:29:56 | 1  | 15:32:19 | 1  |
| 15:30:01 | 2  | 15:32:23 | 2  |
| 15:30:04 | 3  | 15:32:25 | 3  |
| 15:30:07 | 4  | 15:32:29 | 4  |
| 15:30:11 | 5  | 15:32:31 | 5  |
| 15:30:14 | 6  | 15:32:34 | 6  |
| 15:30:14 | 7  | 15:32:50 | 7  |
| 15:30:15 | 8  | 15:32:52 | 8  |
| 15:30:19 | 9  | 15:32:58 | 9  |
| 15:30:23 | 10 | 15:33:00 | 10 |
| 15:30:27 | 11 | 15:33:03 | 11 |
| 15:30:30 | 12 | 15:33:08 | 12 |
| 15:30:30 | 13 | 15:33:10 | 13 |
| 15:30:30 | 14 | 15:33:12 | 14 |
| 15:30:35 | 15 | 15:33:14 | 15 |
| 15:30:38 | 16 | 15:33:17 | 16 |
| 15:30:40 | 17 | 15:33:17 | 17 |
| 15:30:46 | 18 | 15:33:20 | 18 |
| 15:30:50 | 19 | 15:33:21 | 19 |
| 15:30:53 | 20 | 15:33:24 | 20 |
| 15:31:02 | 21 | 15:33:42 | 21 |
| 15:31:03 | 22 | 15:33:43 | 22 |
| 15:31:05 | 23 | 15:33:44 | 23 |
| 15:31:07 | 24 | 15:33:47 | 24 |
| 15:31:10 | 25 | 15:33:47 | 25 |
| 235      |    | 237      |    |
| 15:31:12 | 1  | 15:33:50 | 1  |
| 15:31:13 | 2  | 15:33:51 | 2  |
| 15:31:28 | 3  | 15:33:54 | 3  |
| 15:31:30 | 4  | 15:33:54 | 4  |
| 15:31:31 | 5  | 15:34:00 | 5  |
| 15:31:33 | 6  | 15:34:06 | 6  |
| 15:31:33 | 7  | 15:34:09 | 7  |
| 15:31:34 | 8  | 15:34:29 | 8  |
| 15:31:36 | 9  | 15:34:34 | 9  |
| 15:31:36 | 10 | 15:34:36 | 10 |
| 15:31:39 | 11 | 15:34:39 | 11 |
| 15:31:41 | 12 | 15:34:49 | 12 |
| 15:31:43 | 13 | 15:34:53 | 13 |
| 15:31:46 | 14 | 15:34:53 | 14 |
| 15:31:49 | 15 | 15:34:56 | 15 |
| 15:31:49 | 16 | 15:34:58 | 16 |
| 15:31:52 | 17 | 15:35:01 | 17 |
| 15:31:55 | 18 | 15:35:04 | 18 |
| 15:31:58 | 19 | 15:35:06 | 19 |
| 15:31:58 | 20 | 15:35:10 | 20 |
| 15:32:01 | 21 | 15:35:15 | 21 |
| 15:32:04 | 22 | 15:35:19 | 22 |
| 15:32:07 | 23 | 15:35:19 | 23 |
| 15:32:11 | 24 | 15:35:23 | 24 |
| 15:32:16 | 25 | 15:35:25 | 25 |

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| <p style="text-align: right;">238</p> <p>15:35:28 1 contained. It wasn't to write the code and to name</p> <p>15:35:30 2 the variables in the code.</p> <p>15:35:31 3 <b>Q. Can you tell me what calculation is being</b></p> <p>15:35:36 4 <b>performed in line 1 and 2?</b></p> <p>15:35:37 5 A. I think -- I'm not sure, but I think what</p> <p>15:36:22 6 they're doing here is calculating the difference in</p> <p>15:36:26 7 the predicted collusive price and the but-for</p> <p>15:36:32 8 collusive price.</p> <p>15:36:34 9 <b>Q. How uncertain are you?</b></p> <p>15:36:36 10 A. I don't know what -- I said I'm doing the</p> <p>15:36:39 11 best I can, but obviously I cannot remember what this</p> <p>15:36:42 12 particular line of code does. I don't remember -- I</p> <p>15:36:47 13 don't even think I may have ever known what</p> <p>15:36:50 14 particular line of code made which particular</p> <p>15:36:53 15 calculation. So I've never examined this code on a</p> <p>15:36:56 16 line-by-line basis to try to figure out what every</p> <p>15:36:59 17 single line does.</p> <p>15:37:00 18 <b>Q. This -- this is the implementation of your</b></p> <p>15:37:05 19 <b>regression model, correct?</b></p> <p>15:37:07 20 A. Yes.</p> <p>15:37:08 21 <b>Q. And this is what a jury would have to endorse</b></p> <p>15:37:11 22 <b>in order to calculate on your view individual damages</b></p> <p>15:37:15 23 <b>for the members of the class and the consumers in the</b></p> <p>15:37:18 24 <b>plaintiff states?</b></p> <p>15:37:19 25 MR. FRIEDMAN: Objection, form.</p>                                                                                | <p style="text-align: right;">240</p> <p>15:39:13 1 wasn't the correct way to do it. So it's not</p> <p>15:39:16 2 reported.</p> <p>15:39:16 3 <b>Q. Well, isn't line 192 but-for minus predicted?</b></p> <p>15:39:22 4 A. Yeah, but the but-for is a prediction. I</p> <p>15:39:27 5 mean the but-for price is the price that would</p> <p>15:39:30 6 pertain in the absence of collusion, and so it has to</p> <p>15:39:35 7 be estimated.</p> <p>15:39:35 8 <b>Q. Yes. And I said is this not calculating the</b></p> <p>15:39:39 9 <b>but-for price minus the predicted actual price.</b></p> <p>15:39:43 10 A. Predicted is the crucial word. It's not the</p> <p>15:39:47 11 actual price. It's the predicted price. I mean, I'm</p> <p>15:39:51 12 not certain that that mnemonic refers to this because</p> <p>15:39:56 13 I don't know what mnemonic was assigned to, A, the</p> <p>15:40:00 14 actual price or, B, the predicted actual price after</p> <p>15:40:04 15 collusion. So I don't know what terminology was used</p> <p>15:40:07 16 in communicating with the computer to convey the</p> <p>15:40:13 17 notion of calculating the damages.</p> <p>15:40:15 18 So I just don't remember what -- and I -- I</p> <p>15:40:19 19 did see such a list a long time ago, but I certainly</p> <p>15:40:23 20 didn't attempt to memorize it.</p> <p>15:40:24 21 <b>Q. Is it possible that the coding implemented</b></p> <p>15:40:27 22 <b>your methodology in a different way than you</b></p> <p>15:40:29 23 <b>intended?</b></p> <p>15:40:30 24 A. It's perfectly conceivable, but -- I can</p> <p>15:40:36 25 certainly ask them and find out if they screwed up</p> |
| <p style="text-align: right;">239</p> <p>15:37:21 1 THE WITNESS: This code implements the</p> <p>15:37:24 2 regression model that I instructed the people working</p> <p>15:37:28 3 for me at Ashenfelter &amp; Ashmore to undertake.</p> <p>15:37:35 4 Remembering the specific names -- what all the</p> <p>15:37:38 5 specific names refer to, I'm not going to be able to</p> <p>15:37:40 6 do that and I'm not going to attempt to. It's not</p> <p>15:37:45 7 that -- in my task.</p> <p>15:37:47 8 <b>Q. MR. SWANSON: So if I go through line 209 or</b></p> <p>15:37:50 9 <b>any of the other hundred and 20 possible variables</b></p> <p>15:38:00 10 <b>that are reflected in here --</b></p> <p>15:38:05 11 A. A lot of them are obvious. You're picking</p> <p>15:38:07 12 things that are especially inobvious. All right?</p> <p>15:38:11 13 And so -- of course. You know, you hand me something</p> <p>15:38:15 14 with a long list of variables in it, I'm not going to</p> <p>15:38:19 15 remember everything in it by memory. I'd be foolish</p> <p>15:38:21 16 to even try.</p> <p>15:38:22 17 <b>Q. What is 209?</b></p> <p>15:38:24 18 A. I haven't looked at it yet. I have no idea</p> <p>15:38:46 19 what that is.</p> <p>15:38:47 20 <b>Q. Going back to line 192, you testified that</b></p> <p>15:38:53 21 <b>you calculated actual minus predicted price, right?</b></p> <p>15:38:57 22 A. Yeah, that -- the actual minus predicted is</p> <p>15:39:03 23 what's in the report because I told you earlier there</p> <p>15:39:06 24 is this alternative way that this was an estimate of</p> <p>15:39:10 25 it. There was also an estimate of it made, but it</p> | <p style="text-align: right;">241</p> <p>15:40:39 1 and didn't do what I told them to do. That's</p> <p>15:40:42 2 certainly a possibility.</p> <p>15:40:43 3 <b>Q. And who would be the person to ask that?</b></p> <p>15:40:47 4 <b>Would that be Mr. Ashmore?</b></p> <p>15:40:49 5 A. Well, would be three or four people, but he'd</p> <p>15:40:52 6 be the one I asked first, yes.</p> <p>15:40:54 7 <b>Q. And he was the one you relied upon to</b></p> <p>15:40:56 8 <b>faithfully implement your methodology?</b></p> <p>15:40:58 9 A. Well, they're all being relied on. I mean,</p> <p>15:41:01 10 that's not fair. Everybody's relied on, including</p> <p>15:41:06 11 Orley Ashenfelter. He was involved with this as</p> <p>15:41:10 12 well.</p> <p>15:41:10 13 <b>Q. Do you hold any opinions to which you intend</b></p> <p>15:41:19 14 <b>to testify at trial that were not set forth in your</b></p> <p>15:41:22 15 <b>declaration or discussed in this deposition?</b></p> <p>15:41:23 16 A. I don't think so. You might try me, but I</p> <p>15:41:26 17 think I've expressed all my opinions.</p> <p>15:41:29 18 <b>Q. It has been your intent to disclose them all</b></p> <p>15:41:31 19 <b>in your report and answer my questions obviously</b></p> <p>15:41:35 20 <b>today.</b></p> <p>15:41:36 21 A. Yes, I have attempted to answer -- to</p> <p>15:41:39 22 disclose everything that I have done, all the</p> <p>15:41:41 23 opinions that I have.</p> <p>15:41:43 24 <b>Q. Do you have any plans to revise your</b></p> <p>15:41:46 25 <b>declaration as you sit here today?</b></p>                                                                    |